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In the Supreme Court of the United States

OCTOBER TERM, 1983

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., CALIFORNIA PARALYZED VETERANS ASSOCIATION, PAULA ZELLER and PATTY ANN BERKOSKY,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

CBS, INC., and METROMEDIA, INC.,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY FLEISHMAN*
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 551-2923

OF COUNSEL:

SAM ROSENWEIN

ARTHUR BRODY
LAW INSTITUTE FOR THE DISABLED AND ELDERLY
SOUTHWESTERN UNIVERSITY SCHOOL OF LAW
3045 W. Seventh Street
Los Angeles, California 90005
(213) 738-6825

Attorneys for Petitioners

*Counsel of record

Westside Law Publishers Los Angeles, California (213) 477-0491

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QUESTIONS PRESENTED

1. Whether the FCC must promulgate a regulation under the "public interest" provision of the Communications Act to further the national policy of promoting and expanding employment opportunities for qualified handicapped people, and to insure that television programming fairly reflects the tastes and viewpoints of people with disabilities.

2. Whether the FCC denied petitioners equal protection of the law guaranteed by the Fifth Amendment when, contrary to congressional intent, it refused to afford qualified handicapped persons employment opportunities similar to those it affords to women and racial minorities in the broadcast industry.

3. Whether the Court of Appeals erred in analyzing petitioners' equal protection claim under the "mere rationality" test, rather than under a "heightened scrutiny" test.

4. Whether the FCC must promulgate a regulation pursuant to section 504 of the Rehabilitation act, prohibiting employment discrimination against qualified handicapped persons, because it grants broadcast licensees Federal financial assistance within the meaning of *Grove City College v. Bell*, ____ U.S. ____ (1984).

5. Whether the 1978 Amendment to section 504 of the Rehabilitation Act requires the FCC, as an "executive agency," to promulgate a regulation prohibiting employment discrimination against qualified handicapped people, by broadcast licensees.

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California Association of the Physically Handicapped, Inc., California Paralyzed Veterans Association, Paula Zeller and Patty Ann Berkosky respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed and entered the 8th day of December 1983.

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*The caption reveals all parties directly interested in this litigation. All broadcast licensees are potentially interested.

Opinions Below

The opinion of the Court of Appeals is reported at 721 F.2d 667 and is set forth as Appendix "A" (App. 1-9). The order of the FCC dated March 6, 1980 is reported at 76 F.F.C.2d 86 (1980) and is set forth as Appendix "B" (App. 11-41). The Commission's order dated August 4, 1980, denying the petition for reconsideration is reported at 80 F.C.C.2d 299 (1980) and is set forth as Appendix "C" (App. 43-48). The order of the United States District Court for the Central District of California dated March 11, 1980, is unreported and is set forth as Appendix "D" (App. 49-51). The order of the United States District Court for the Central District of California dated November 24, 1980, providing for the entry of the final judgment in favor of the Commission is unreported and is set forth as Appendix "E" (App. 53-54).

Jurisdiction

The opinion of the Ninth Circuit was filed on the 8th day of December 1983. A duly filed Petition for Rehearing was denied on February 27, 1984. The order denying said petition is set forth as Appendix "F" (App. 55). Justice Rehnquist extended until June 18, 1984 the time within which to file a Petition for Writ of Certiorari. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutes and Constitutional Provisions Involved

Section 504 of the Rehabilitation Act of 1973 as amended (29 U.S.C. § 794) and relevant provisions of the Communications Act of 1934 as amended (47 U.S.C. § 151 et seq.) and the relevant provisions of the Fifth Amendment to the United States Constitution are set forth as Appendix "G" (App. 57-59).

Statement of the Case

A. Administrative Proceedings in the Federal Communications Commission.

In September 1977, petitioner California Association of the Physically Handicapped, Inc. ("CAPH") filed with the FCC a petition seeking the adoption of rules prohibiting discrimination by broadcast licensees against qualified handicapped persons, similar to the rules already established by the Commission applicable to racial minorities and women. (App. 12) The petition also sought the adoption of an FCC policy that would encourage an increase in the ownership and management of broadcast stations by handicapped persons. (App. 14)

In July 1978, the FCC responded to this petition by adding issues regarding broadcasting and the physically handicapped to an ongoing rulemaking proceeding that was considering amendments to the agency's equal employment opportunity rules. *Further Notice of Proposed Rulemaking,* FCC 78-468, 43 Fed.Reg.30078 (July 13, 1978). The *Further Notice* solicited comments on: (a) whether the handicapped should be included in the agency's equal employment opportunity rules; (b) definitions and categories of handicapped persons to be included in any rules; (c) the extent to which licensees should be required to modify their facilities to accommodate handicapped employees and the legal basis for any such requirement. (*Id.*)

In March 1980, the Commission decided that the public interest standard of the Communications Act did not warrant including the handicapped in the Commission's EEO program, and that section 504 of the Rehabilitation Act did not require promulgation of rules by the FCC. (App. 11-41) The FCC acknowledged that commencing in 1968, it exercised jurisdiction over the employment practices of broadcast licensees based on its understanding of the national policy against discrimination in employment on the basis of race, religion, sex or nationality.

Because broadcasters are licensed under the Communications Act to serve the public interest, the Commission concluded that it would be unable to find a broadcaster to be operating in the public interest if it was violating that national policy against employment discrimination. (App. 23-25) The Commission found "differences" between the handicapped and the groups already in its EEO program and therefore declined to issue a rule under the Communications Act, prohibiting broadcast licensees from violating the national policy forbidding employment discrimination against handicapped people. (App. 30-31) The Commission also declined to issue a rule pursuant to the Rehabilitation Act, asserting that broadcast licensees are not recipients of Federal financial assistance within the meaning of the Act. The Commission also refused to require broadcast licensees to make their facilities physically accessible, to enable potential employees to get into the building. The Commission stated that it was "extremely reluctant" to impose such a requirement when it might require "substantial expenditures for modification of facilities which may then be used by only one person for a limited period of employment." (App. 31) Finally, the Commission declined "to adopt a program to enhance ownership and management of the physicially handicapped." (App. 31)

Reconsideration of the Commission's order was sought by petitioners CALIFORNIA PARALYZED VETERANS ASSOCIATION, PAULA ZELLER and PATTY ANN BERKOSKY. The Commission found that the only new matter raised in the Petition for Reconsideration was the contention that the Commission's failure to afford handicapped persons similar employment rights to those afforded women and racial minorities violated the Equal Protection provision of the Fifth Amendment. The Commission asserted that it was reasonable for it to permit broadcast licensees to discriminate against qualified handicapped persons, while prohibiting broadcasters from discriminating against women and racial minorities, and rejected petitioners' equal protection claims. (App. 46-47)

B. The District Court Litigation

In February 1979, CAPH sought injunctive and declaratory relief in the United States District Court for the Central District of California against the FCC and CBS, Inc., on essentially the same grounds upon which its petition for rulemaking had been based. One year later, in February 1980, the District Court granted the Commission's motion to dismiss, ordering that "[a]ll claims against the FCC are dismissed for lack of jurisdiction in light of the Commission action of February 13, 1980."[1] (App. 51) In November 1980, the court, acting pursuant to Rule 54(b) of the Rules of Civil Procedure, ordered that a final judgment be entered in favor of the FCC. (App. 54)

C. Proceedings in the Court of Appeals

CAPH filed a petition for review of the FCC order dated March 6, 1980 (Appendix B). Petitioners CALIFORNIA PARALYZED VETERANS ASSOCIATION, PAULA ZELLER, and PATTY ANN BERKOSKY filed a petition for review of the Commission's order dated August 4, 1980, denying the petition for reconsideration (Appendix C). CAPH filed an appeal from the District Court's order dated March 11, 1980 (Appendix D). The Court of Appeals consolidated all matters and rendered a single opinion disposing of all issues. The Court of Appeals held that *Community Television of Southern California v. Gottfried*, ___ U.S. ___, 103 S.Ct. 885 (1983) precludes petitioners' argument that the Commission has a duty to promulgate the requested regulation under the Communications Act and/or the Rehabilitation Act. (App. 4-5) The Court of Appeals also rejected petitioners' argument that they were denied equal protection of the laws (App. 5).

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[1] On February 13, 1980 the FCC announced its decision. The order was dated March 6, 1980 (App. 11).

REASONS FOR GRANTING WRIT

The petition for writ of certiorari should be granted because the Court of Appeals misconstrued this Court's holding in *Community Television of Southern California v. Gottfried*, ____ U.S. ____, 103 S.Ct. 885 (1983) ("*Gottfried I*"), when it held that *Gottfried I* relieved the FCC of all obligations under the Communications Act, and the Rehabilitation Act, to promulgate a regulation to afford equal employment opportunities to qualified handicapped people. (App 4-5)

Gottfried I supports petitioners' contention that the FCC, in implementing the Communications Act, must take into account the national policy established by the Rehabilitation Act, to afford all individuals with handicaps the opportunity to "live full and independent lives." *Id.* at 892. The national interest in having all television stations consider and serve their handicapped viewers is "strong" and the Commission may not permit a licensee to ignore the needs of particular groups within the viewing public. *Id* at 893 and at 893 n. 13. This interest is best served by rule making. *Id.*

In the case at bar, petitioners did file a petition with the Commission for rulemaking. The Court of Appeals' holding that *Gottfried I* relieves the FCC of its duty under the Communications Act to treat the nation's handicapped minority similarly to the way it treats other minorities is simply wrong.

The petition should also be granted because this case raises the important question of what standard of review is to be used in analyzing an equal protection claim raised by the disabled minority—a minority consisting of over 35 million people. The FCC and the Court of Appeals held that petitioners' equal protection claim is to be tested by the "mere rationality" test. The ruling by the Court of Appeals herein appears to conflict with *Cleburne Living Center v. City of Cleburne, Texas*, 726 F.2d 191 (5th Cir. 1984) which applied a "semi-suspect" test to an equal

protection claim made by one segment of the handicapped minority.

I

THE FCC MUST PROMULGATE A REGULATION UNDER THE "PUBLIC INTEREST" PROVISION OF THE COMMUNICATIONS ACT TO FURTHER THE NATIONAL POLICY OF PROMOTING AND EXPANDING EMPLOYMENT OPPORTUNITIES IN THE BROADCAST INDUSTRY FOR QUALIFIED HANDICAPPED PEOPLE, AND TO INSURE THAT TELEVISION PROGRAMMING FAIRLY REFLECTS THE TASTES AND VIEWPOINTS OF PEOPLE WITH DISABILITIES.

A. Since 1968, the Commission has recognized its obligation under the public interest standard to protect minorities from employment discrimination by its licensees. *Petition for Rulemaking to Require Broadcast Licensees to Show Non-discrimination in their Employment Policies*, 13 FCC 2d 766 (1968). The Commission based its decision to promulgate this regulation on the national policy against employment discrimination and the requirement that broadcasters, as public trustees, act in the public interest. The Commission stated:

> [W]hen these two considerations are taken together—the national policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the national policy.

Id at 769.

In 1969 the Commission adopted specific rules requiring both non-discrimination and affirmative action. *Petition for Rulemaking to Require Broadcast Licensees to Show*

Non-discrimination in their Employment Practices, 18 FCC 2d 240 (1969). This regulation requires licensees not to discriminate in employment on the basis of race, color, religion, or national origin, and to actively recruit and employ minorities. *Id.* The 1969 regulation did not cover discrimination on the basis of sex. But in 1970 the Commission added sex discrimination to the previously adopted rules, and also instituted use of Form 395, the Annual Employment Report. *Petition for Rulemaking to Require Broadcast Licensees to Show Non-discrimination in their Employment Practices*, 23 FCC 2d 430 (1970).

In 1975, noting that the need for specific affirmative action implicit in the Commission's rules apparently was not clear to some licensees, the Commission proposed to adopt a Model EEO program. *Non-discrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC 2d 354 (1975). Such action was taken in 1976. *Non-discrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976).

In 1978, the Commission reviewed its EEO programs in a *Statement of Policy on Minority Ownership of Broadcasting Facilities*. 68 FCC 2d at 979 (1978). After reviewing its actions to assure that equal opportunity in employment is afforded by broadcast licensees to all qualified persons, the Commission stated:

> The Supreme Court has spoken favorably of such Commission action. In *NAACP v. FPC*, 425 U.S. 662, 670 n. 7 (1976) the Court observed:
>
> > "The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. . . . These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934. . . to insure that its licensees'

> programming fairly reflects the tastes and viewpoints of minority groups."

Id. at 980.[2]

The Commission stated that it was:

> compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 *but also of the First Amendment.*

(Id. at 980-981.) (Emphasis added.)

The Commission added that affecting programming by its equal employment opportunity policies avoids direct government intrusion into programming decisions.

B. Just as the FCC was required to institute an EEO rule for women and racial minorities, it is required to promulgate a rule to further the national policy of promoting and expanding employment opportunities in the broadcast industry for qualified handicapped persons, and to insure that television programming fairly reflects the tastes and viewpoints of that minority.

1. The Rehabilitation Act establishes a national policy of promoting employment opportunities for qualified handicapped persons, and for prohibiting discrimination against them. Congress concluded that employment dis-

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[2]Where the Commission has lagged in accepting its responsibility courts have not hesitated to direct it to do so. *See, e.g., Black Broadcasting Coalition of Richmond v. FCC,* 556 F.2d 59 (D.C.Cir.1977) (per curiam); *Office of Communication of United Church of Christ v. FCC,* 358 F.2d 994 (D.C. Cir. 1966)

against qualified handicapped persons is just as evil, and just as hurtful to the nation, as employment discrimination against women and racial minorities. The Act was passed to enable handicapped people "to live full and independent lives." *Gottfried I, supra*, 103 S.Ct. at 892. This Term the Court added that the Act:

> establishes a comprehensive federal program aimed at improving the lot of the handicapped. Among its purposes are to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and place such individuals in employment." . . . To further these purposes, Congress enacted section 504 of the Act.

Consolidated Rail Corp. v. Darrone, ___ U.S. ___, ___, 104 S.Ct. 1248, 1250 (1984).

The Court stated that it is unquestionable that section 504 was intended to reach employment discrimination, saying:

> Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether section 504 was intended to prohibit other types of discrimination as well.

Id. at 1253. In footnote 12, the Court stated that Congress recognized that vocational rehabilitation of the handicapped would be futile if those who were rehabilitated could not obtain jobs because of discrimination. The Court noted that sections 501 and 503 of the Rehabilitation Act also were aimed at discrimination in employment, and stated:

> Employment discrimination . . . would have "a profound effect on the provision of relevant and effective [rehabilitation] services."

In footnote 13, the Court said the language of section 504 is broad, and cannot be read in isolation from its history and purposes.

The legislative history of the Rehabilitation Act, as it applies to employment of handicapped people is set forth in *LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767, 772-776 (3rd Cir. 1982); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085-1108 (5th Cir. 1980) (Goldberg, J., dissenting.) and *Prewitt v. United States Postal Service*, 662 F.2d 292, 301-304 (5th Cir. 1981). From this history Judge Goldberg concluded in *Rogers* that Congress intended that employment discrimination "against the handicapped was to be treated as similarly as possible to that against other minority groups in those contexts in which the Act applies." 611 F.2d at 1095. *See, Senate Conference* S.Rep. No. 93-1270, 93rd Cong. 2d sess. 25-26 (1974).

Senator Birch Bayh, in his Foreword to the *Symposium Issue on Employment Rights of the Handicapped*, 27 DePaul L.Rev. 943, 944-45 (1978), stated that the Rehabilitation Act "may be one of the most important pieces of legislation in our nation's history," and that the greatest impact for handicapped citizens lies within "section 501, mandating non-discrimination by the federal government in its own hiring processes; section 503, prohibiting discrimination and requiring affirmative action on the part of federal contractors. . .; and finally, section 504 prohibiting discrimination against handicapped individuals in any federally funded program or activity."

It is thus plain that Congress has charted a clear and pervasive national policy prohibiting employment discrimination against handicapped individuals, and calling for equal employment opportunities for qualified handicapped individuals.[3] This national policy is at least as

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[3]This national policy is reflected in other statutes designed to achieve "the commendable goal of total integration of handicapped persons into the mainstream of society." *In re Marriage of Carney*,

strong as the parallel national policy favoring women a d racial minorities.

2. The need to insure that television programming fairly reflects the unique tastes and viewpoints of handicapped individuals is at least as great as the need to insure that it fairly reflects the tastes and viewpoints of women and racial minorities.

When Congress enacted the White House Conference on Handicapped Individuals Act, 88 Stat. 1631. *See*, 29 U.S.C.A. §701, Historical Note, it set as a national goal the integration of disabled individuals into normal community living and working conditions. In accordance with the provisions of the White House Conference Act, a conference was held in Washington, D.C. May 23-27, 1977. Throughout the proceedings it was emphasized that the major barrier to integration into society by disabled people is attitudinal. *See generally, The White House Conference on Handicapped Individuals,* Volume I, Awareness Papers (1977) and particularly 89-105. The Implementation Plan of *The White House Conference on Handicapped Individuals,* Volume III, 39, reads:

> The depiction of handicapped individuals that is presented to the public is usually that of a

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24 C.3d 728, 740 (1970). *See also, Id.* notes 10 and 11. On October 3, 1982, President Reagan, instituting National Employ the Handicapped Week issued a proclamation stating (47 Fed.Reg.40,525 (1982)):

> To lead more successful lives, disabled Americans must be part of the work force. Despite . . . advances, employment of disabled men and women lags behind that of the general working-age population. There is an urgent need for the private sector to take the lead in offering jobs that provide individual dignity and enable disabled men and women to support their families. . . . We need to affirm the dignity and worth of all people in our society, whether or not they suffer from physical and mental disabilities, and we must firmly reject attitudes that deny the worth of handicapped individuals.

person seemingly helpless, needy and neglected. It might also be of a handicapped person who, with extraordinary effort, has overcome obstacles seemingly contrived to defeat the person's achievement of a chosen goal.

Neither of these images accurately represent the millions of handicapped individuals in our society. However, these misconceptions of people with disabilities stimulate the public to hold an attitude that handicapped individuals are "different"; therefore, a better balance and range of images is required to assist many of the general public in overcoming their feelings that unique behavior is called for when meeting or relating to a person with a disability.

Although handicapped individuals do need certain accommodations, they have the potential of being integrated into all facets of daily life. This integration can be made possible through a change in public attitude. Awareness by the public of the capabilities of handicapped persons must be stimulated to assure them the same social and civil rights enjoyed by all the people of these United States.

The Conference recommended that the FCC

> initiate changes in the Federal Communications Commission's regulations, guidelines, and licensing procedures. These changes shall encourage broadcasters, as part of their public service responsibilities, to take a more active role in fostering positive public attitudes towards persons with handicaps. The Federal Communications Commission shall place persons with handicaps in influential positions within the Commission to establish and enforce these new policies and regulations. (*Id.* at 40)

The Conference also recommended that the FCC organize public hearings to assess the communications industry's portrayal of and access by persons with handicaps. The FCC public hearings were to be held throughout the country. *Id.*

There was no follow-up by the FCC to these recommendations. Indeed, even the U.S. Commission on Civil Rights overlooked the handicapped minority when it issued its report in 1977: *Window Dressing on the Set: Women and Minorities in Television. Window Dressing* reported the findings of studies of television drama broadcast from 1969 to 1974 and news programs broadcast in 1974-1975. It also contained a study of the employment status of women and minorities at 40 local television stations. The conclusion reached in the report was that women and minorities are underemployed in the television industry, and as a consequence their attitudes and views are not fairly portrayed on the television screen. The report, which consists of 182 pages, never once mentions the underemployment of disabled people and the failure of television to portray them as "normal" individuals, capable of living proud, productive, and dignified lives.

In 1979 the Civil Rights Commission issued a follow-up report, analyzing the portrayals of minorities and women on television drama from 1975 to 1977 and an analysis of minorities and women in the news of 1977. In this report, the Civil Rights Commission noted that television is a dominant factor in American life and is preeminent as a communicator of ideas and as an entertainment form. Because of its capacities for fixing an image in the public mind, the Civil Rights Commission stated, the television broadcasters, as public trustees, have a

> responsibility for avoiding stereotypic and demeaning depictions. . . . The encompassing nature of the medium necessitates that diversity among decision makers, news makers and news

> casters become an integral aspect of television. Because the Commission's 1977 report. . . documented a troubling distance from this goal, the [Civil Rights] Commission has reconsidered television's treatment of women and minorities.

Preface, *Window Dressing on the Set: an Update* (1979).

This updated report, like its predecessor, does not once mention the plight of disabled persons.[4]

It is thus plain that fair and truthful portrayals of disabled people on the television screen are needed and serve not only the interests of the disabled minority but also enrich and educate the non-handicapped audience. Such portrayals enhance the public interest and are required by the Communications Act.

C. The FCC acted arbitrarily, and contrary to law, when it purported to exercise its discretion not to use its

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[4]The inside page of the updated report reads in part as follows:

> U.S. COMMISSION ON CIVIL RIGHTS
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> The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:
>
> . . . .
>
> • Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
> • Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
> • Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
> • Submit reports, findings, and recommendations to the President and the Congress.

authority to issue an EEO rule for disabled people. When Congress enacted the Rehabilitation Act it clearly intended that employment discrimination against the handicapped was to be treated as similarly as possible to that against other minority groups. *See, Senate Conference* S.Rep. No. 93-1270, 93rd Cong. 2d sess. 25-26 (1974). The Act was passed against a background of well understood law which was explicitly designed as a guide to interpretation. The Commission acted unreasonably in needlessly treating employment discrimination against the handicapped differently than it treats discrimination against other minority groups. Congress did not adopt the analogy between handicap and race merely as a legislative means to a policy goal. Rather, it was persuaded and politically energized by the view that the analogy was correct. A failure to follow the analogy to where it leads "is an outright disagreement with Congress's judgment and an unconstitutional act in itself." *U.S. v. University Hospital,* 729 F.2d 144, 163 (2d Cir. 1984) (Winter, J., dissenting.)

The FCC stated that it was exercising its "discretion" when it decided not to afford qualified disabled individuals employment opportunities in the broadcast industry similar to those it affords women and racial minorities. (App. 30) The FCC has no discretion, however, to make a policy decision that is contrary to congressional intent. In refusing to follow the national policy as set by Congress, the FCC acted arbitrarily and exceeded the limits of its delegated authority. *See, Planned Parenthood Federation of America v. Heckler,* 712 F.2d 650, 655, 656 (D.C. Cir. 1983); *Office of Communication of United Church of Christ v. FCC, supra,* 707 F.2d at 1422, 1424. Reviewing courts "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did

not fully review such administrative decisions." *NLRB v. Brown,* 380 U.S. 278, 291, 292 (1965). Where, as here, the Commission's action and inaction frustrate congressional intent, the Court is duty-bound to correct the Commission.

II

THE FCC DENIED PETITIONERS EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN, CONTRARY TO CONGRESSIONAL INTENT, IT REFUSED TO AFFORD QUALIFIED HANDICAPPED PERSONS EMPLOYMENT OPPORTUNITIES SIMILAR TO THOSE IT AFFORDS TO WOMEN AND RACIAL MINORITIES IN THE BROADCAST INDUSTRY.

A. The Action of the FCC Fails the Heightened Scrutiny Test.

The Court of Appeals dismissed petitioners' submission that the handicapped should be afforded heightened scrutiny,[5] saying that no appellate court has so held, and adding that it declined "to be the first." (App. 5) Two weeks earlier a different panel of the Court of Appeals for the Ninth Circuit expressed the view that one segment of the handicapped, as defined by Congress (29 U.S.C. § 706(7)), is entitled to heightened scrutiny. *J. W. v. City of Tacoma, Washington*, 720 F.2d 1126 (9th Cir. 1983). Indeed the court stated (*Id.* at 1130 n.4):

> We do not foreclose the possibility that, in a case with a record more fully developed as to the characteristics and status of former mental patients, a conclusion that they indeed constitute a suspect class might be warranted.

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[5]The Court of Appeals overlooked petitioners' argument that if the handicapped were not to be treated as a suspect class. they should at least be treated as a semi-suspect class.

In reaching the conclusion that heightened scrutiny is appropriate, the court relied upon *Plyler v. Doe*, 457 U.S. 202 (1982) which afforded heightened scrutiny, although the group did not constitute a suspect class and no fundamental right was involved. Heightened scrutiny was found to be appropriate in *City of Tacoma* because "the affected group possessed some of the characteristics of a suspect class, and the benefit denied to the group was, if not fundamental, important." 720 F.2d at 1128. The court found the *Plyler* formulation consistent with the approach in other cases in which the decision whether to apply intensified scrutiny turned upon whether the group singled out had been subjected to unique disabilities on the basis of stereo-typed characteristics not truly corresponding to the attributes of its members. Heightened scrutiny may be appropriate for such classifications because they raise constitutional problems of the same variety as those this Court treats as "presumptively invidious." 720 F.2d at 1129.

In *Cleburne Living Center v. City of Cleburne, Texas*, 726 F.2d 191, 192 (5th Cir. 1984) the court reached a similar conclusion, stating that the combination of historical prejudices, political powerlessness, and immutability called for heightened scrutiny for the mentally retarded. In *Kampmeier v. Nyquist*, 553 F.2d 296, 299 n. 8 (2d Cir. 1977) the court left open the possibility that the handicapped minority might qualify as a suspect class. *See also, N.Y.S. Association of Retarded Children v. Carey*, 466 F.Supp.479, 504 (E.D.N.Y.1978); *In re Marriage of Carney*, 24 C.3d 725, 729 n.3 (1979); *In re G.H.*, 218 N.W.2d 441, 447 (N.D.1974).

It cannot be denied that disabled persons have suffered grave injustices, and have been subjected to extraordinary prejudice. In *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) the Court noted that according to Plato, in the ideal society the deformed "will be put away in some mysterious, unknown place, as they should be." *See, U.S. v. University Hospital*, 729 F.2d 144 (2d Cir. 1984). Disabled individ-

uals have traditionally been the object of pity, and viewed as people who are not expected to participate in, or contribute to, society. As late as 1961, a high school text asserted:

> The blind, the deaf, the dumb, the crippled, and the insane and feeble minded are sometimes known collectively as the *defective*—people who are lacking some normal faculty or power. Such people often need to be placed in some special institution in order to receive proper attention.

McCrocklin, *Building Citizenship*, 244 (1961).

To this day disabled individuals are denied equal opportunities in education, employment, access to public and private buildings, and access to transportion. While Black persons were discriminated against by being relegated to the back of a bus, disabled persons are not even able to board a bus, in most instances. In *Snowden v. Birmingham-Jefferson Cty. Tr. Auth.*, 407 F.Supp. 394, 396 (N.D. Ala. 1975) the court rejected the claim of the plaintiff, a mobility disabled woman, who asserted that she was denied statutory and constitutional rights because the Transit District was without buses designed and equipped to accommodate mobility-handicapped persons. The court said that such people are permitted to ride on the bus "when they are able, alone or with the assistance of others, to do so," and added:

> Although it is necessary for persons handicapped . . . to arrange for someone to help them board and alight from the bus, those persons are allowed to use the transportation vehicles in question. Thus, it cannot be said that persons who ambulate by wheelchair are excluded from using the defendant's transportation system.

Id. at 397. *See, American Public Transit Ass'n v. Lewis*, 655 F.2d 1272 (D.C.Cir.1981).

Congress has explicitly found that the benefits and fundamental rights of this society are often denied handi-

capped persons, and that it is of critical importance to this nation that equality of opportunity and equal rights guaranteed by the Constitution be provided to all individuals with handicaps. *White House Conference on Handicapped Individuals Act, Supra.*[6]

It is against this background that petitioners assert that their equal protection claim should be analyzed under a heightened scrutiny test. A "handicapped individual" is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7) (B). Such individuals are entitled to heightened judicial scrutiny. *See,* Tribe, *American Constitutional Law*, 1081 n. 17 (1978) ("The case of discrimination against handicapped persons . . . may be suitable for analogous 'semi-suspect' treatment. Only recent pressure from the handicapped themselves has resulted in state and federal action to remove landscape and architectural barriers to disabled persons therefor barred from employment in or enjoyment of buildings and parks. . . .")

When measured against a "heightened scrutiny" test the FCC's action plainly fails. It also fails under the more relaxed rationality test used by the Court of Appeals in the case at bar.

B. The Action of the FCC Fails the Rationality Test.

The Equal Protection Clause of the Fifth Amendment directs that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S.412, 415 (1920). The discretion to determine what is

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[6]In an attempt to correct this inequality and to enable disabled individuals to live their lives independently, with dignity, and integrated into normal community living and working relationships, Congress has passed far reaching legislation.

"different" and what is "the same" resides in the Congress, and not in the FCC. Congress has determined that in employment matters, the racial minority and the handicapped minority must be treated as similarly as possible. *Rodgers v. Frito-Lay, Inc., supra*, 611 F.2d at 1095 (Goldberg, J., dissenting).

The Court of Appeals however appears to have been of the view that the FCC was free to decide for itself whether the disabled should be treated the same as other minorities protected by Congress. The Court of Appeals stated:

> The FCC claim that in light of problems unique to handicapped persons, setting up an EEO program to monitor employment of the handicapped by FCC licensees required more resources and expertise than was required for similar programs designed to prevent employment discrimination against women and minorities. Because the FCC's justification of its refusal to include the handicapped in its EEO program is reasonable, the FCC did not violate equal

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(*See, e.g.*, Architectural Barriers Act of 1968 (42 U.S.C. § § 4151-4157) [Requires handicapped access to public buildings constructed, leased or financed by the Federal government]; Rehabilitation Act of 1973, § 502 (29 U.S.C. § 792) [Creates Architectural and Transportation Barriers Comprehensive Board to insure compliance with Architectural Barriers Act, and promotes removal of "architectural, transportation, and attitudinal barriers confronting handicapped individuals"]; Urban Mass Transportation Assistance Act of 1970, § 8 (49 U.S.C. § 1612) [Declares Federal policy that mass transit systems be designed for access by handicapped]; *see also*, 49 C.F.R. pt. 609 (1978) [regulations concerning access to mass transit systems receiving Federal financial assistance]; 5 U.S.C. § 7153 [Authorizes rules to prohibit discrimination against handicapped by federal agencies and federal civil service]; 20 U.S.C. § 1401 et seq. [Promotes education of handicapped children]; Rehabilitation Act of 1973, § 501 (29 U.S.C. § 791) [Requires affirmative action programs by federal agencies]; *Id* § 503 (29 U.S.C. § 793) [Requires affirmative action programs by employers who contract with the Federal government]; *Id.* § 504 (29 U.S.C. § 794) [Bars discrimination against handicapped in federally funded programs].)

protection under the rational basis test.

(App. 5)

The Commission's assertion that it is without sufficient "resources and expertise" to promulgate an EEO rule for disabled individuals borders on the frivolous. More than a decade ago Congress mandated in § 501 of the Rehabilitation Act (29 U.S.C. § 791(b)) that each agency in the executive branch (which includes the FCC) shall, within 180 days after September 26, 1973, submit to the Civil Service Commission and to the Interagency Committee on Handicapped Employees an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such agency. That plan was required to include a description of the extent to which, and methods whereby the special needs of handicapped employees are being met. The plan was to be updated and reviewed annually and was to provide "assurances, procedures, and commitments to provide adequate hiring, placement and advancement opportunities for handicapped individuals."

If the FCC wants to promulgate an EEO rule it need do no more than look to the EEO program for handicapped individuals it presumably developed in accordance with the congressional mandate. If the FCC needs additional assistance it is free to look to the Interagency Committee on Handicapped Employees created by the Congress. (29 U.S.C. § 791(a)). If additional guidance is still required, the FCC can look to the regulations promulgated by the Department of Labor to implement section 503 of the Rehabilitation Act. *See*, 41 C.F.R. Part 60. Finally it should be noted that Congress amended § 504 of the Rehabilitation Act in 1978 to require all federal agencies to issue a § 504 regulation. Such a regulation must prohibit employment discrimination against handicapped persons. *See, Consolidated Rail Corp. v. Darrone, supra*, 104 S.Ct. at 1254 n. 14.

The FCC's refusal to issue an EEO rule for handicapped individuals in the broadcast industry is simply irrational. The alleged practical difficulties in establishing such a program are wholly insubstantial. Moreover, practical difficulties cannot justify discrimination. "It is enough that the discrimination shown was palpably unjust and forbidden...." *Mitchell v. United States*, 313 U.S. 80, 97 (1941).

In the case at bar the FCC's classification discriminating against the nation's handicapped minority in employment violates the Equal Protection Clause of the Fifth Amendment because it fails to reflect "a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest" of the government. *Plyler v. Doe, supra*, 457 U.S. at 217.

III

THE FCC MUST PROMULGATE A REGULATION PROHIBITING EMPLOYMENT DISCRIMINATION AGAINST QUALIFIED HANDICAPPED PERSONS, BECAUSE IT GRANTS BROADCAST LICENSEES FEDERAL FINANCIAL ASSISTANCE WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT, AND BECAUSE THE FCC'S LICENSEES ARE FEDERAL CONTRACTORS WITHIN THE MEANING OF SECTION 503 OF THE ACT.

1. The Commission itself has recognized that it grants federal financial assistance to broadcast licensees. On September 11, 1978, Charles D. Ferris, then Chairman of the FCC, stated in testimony before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 95th Cong. 2d sess. 87, 120-123:

> The frequency spectrum is a scarce and valuable natural resource which is made available on the

> public's behalf by the Federal government. I believe that users of the spectrum who obtain a license from the Federal government to operate . . . should pay an equitable fee for the privilege, just as users who wish to drill for oil and gas, mine coal, graze cattle or sheep, or cut timber on federal land pay for that right.
>
> Spectrum is just as necessary to the operation of radio communications as crude oil is to the production of gasoline and land is to the grazing of cattle or the growth of timber. There is no more reason to give away the right to use the spectrum than to give away for free the right to use public owned resources for grazing, cutting, drilling or mining. . . .
>
> If license fees were in fact based on the spectrum's "fair market value," the total revenues collected might well be greater than the Commission's budget. This occurs with other agencies that levy fees for use of federal resources."

Broadcast licensees not only receive their license free of charge, but they also receive through the FCC the services of federal personnel, free of charge. *See, Second Report and Order, Fee Refunds and Future Fees*, 73 FCC 2d 4 (1979); *Fee Suspension, Clarification*, 42 Fed.Reg.3169 (Jan. 17, 1977).

At a recent hearing before a House Subcommittee, the following colloquy took place between Representative Bates and the present Chairman of the FCC:

> MR. BATES: Which brings me to the issue of costs, the costs of your operation, the costs of regulation. . . and I would specifically ask you what percentage of your costs of your operation are recouped by the fees and charges to those whom you regulate?
>
> MR. FOWLER: None. We have no fee schedule.

> MR. BATES: I think that is a deplorable situation. . . .

Subcommittee on Telecommunications, Consumer Protection and Finance, 98th Cong., 2d sess., 67-68 (1984).

This grant, of a valuable national resource, without charge to broadcast licensees, constitutes Federal financial assistance within the meaning of that term as defined in *Grove City College v. Bell*, ____ U.S. ____, 104 S.Ct. 1211 (1984). *See*, Petition for Writ of Certiorari in *Gottfried v. United States of America*, October Term 1983 No. 1614, 15-18.

2. Broadcast licensees are federal contractors within the spirit, if not within the letter, of section 503 of the Rehabilitation Act. Section 503 provides that any contract in excess of $2,500.00 entered into by any federal agency for the procurement of personal property and non-personal services for the United States shall contain a provision requiring that, in employing persons to carry out such contracts, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in the Rehabilitation Act. As interpreted by the Department of Labor, section 503 applies "to all government contracts and subcontracts. . . for use of . . . personal property . . . ." 41 C.F.R. § 60-741.1. Section 60-741.4 of Labor's regulation requires each "contractor" to include an affirmative action clause for handicapped workers which provides in part:

> The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices. . . .

Section 60-741.2 of the regulation defines a government contract as including any "lease arrangements." While a broadcast license is not called a "lease", that is what it is in effect. A broadcast licensee is given the exclusive use of a portion of the public air waves, for a limited time. While the licensee does not pay any "rent", it does promise to act as a public trustee, and to serve the public interest, needs and convenience. As a public trustee "leasing" a portion of the public air waves, a broadcast licensee is a federal contractor. The FCC must therefore make certain that its broadcast licensees—its "lessees"—do not discriminate against qualified handicapped persons, and that they take affirmative action to employ an advance in employment such persons.

CONCLUSION

For the aforesaid reasons the petition for writ of certiorari should be granted.

STANLEY FLEISHMAN
A Professional Corporation

ARTHUR BRODY
LAW INSTITUTE FOR THE DISABLED
AND ELDERLY
SOUTHWESTERN UNIVERSITY SCHOOL OF LAW*

By STANLEY FLEISHMAN
Counsel of Record

OF COUNSEL:

SAM ROSENWEIN

*Counsel acknowledges the
research assistance of
Paula Rosen, Ken Anderson,
Jean LeGrand, Nona Williams,
Ellen Lewenstein, Andrew Treusch,
and Henry Weinblatt

APPENDIX

CALIFORNIA ASSOCIATION OF the PHYSICALLY HANDICAPPED, INC., et al., Appellants-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, et al., Appellees-Respondents,

CBS, Inc., et al., Intervenors.

Nos. 80-6088, 80-7157 and 80-7482.

United States Court of Appeals, Ninth Circuit.

Submitted May 6, 1983.

Decided Dec. 8, 1983.

Before WRIGHT and SCHROEDER, Circuit Judges, and EAST,* District Judge.

EAST, Senior District Judge:

This appeal consolidates an appeal from the District Court's dismissal of an action seeking declaratory and injunctive relief requiring the Federal Communications Commission (FCC) to promulgate regulations in favor of the handicapped, and two petitions for review of FCC orders refusing to promulgate regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Appellants and petitioners argue on appeal that the FCC violated (1) Section 504 of the Rehabilitation Act, (2) the public interest standard of the Communications Act, 47 U.S.C. § 307(c) (1983 Supp.), and (3) the equal

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

protection component of the due process clause of the Fifth Amendment. Appellants also argue that the District Court erred in dismissing their action for lack of subject matter jurisdiction and in denying their motion for attorneys' fees. We find these arguments without merit.

FACTS

In September 1977, the California Association for the Physically Handicapped (CAPH) filed a petition with the FCC requesting the institution of rulemaking proceedings. CAPH petitioned the FCC to include the handicapped in its equal employment opportunity (EEO) rules and to give preference to handicapped individuals in ownership and management of broadcast facilities. In addition, CAPH requested that the FCC require its licensees to modify their facilities to accommodate the handicapped.

The FCC filed its report and order on CAPH's petition on March 6, 1980. The FCC declined to adopt the regulations sought by CAPH. Instead, the FCC promised to appoint a "coordinator for broadcasting and the handicapped" to advise the licensees on methods to increase employment of the handicapped. The FCC also stated that it would consider findings of illegal discrimination against the handicapped in reviewing applications for new licenses and license renewals.

CAPH petitioned this court for review of the FCC's report and order on March 26, 1980. At the same time, the California Paralyzed Veterans Association (CPVA) and two individual litigants filed a petition with the FCC for reconsideration of the report and order. On August 4, 1980, the FCC filed a memorandum opinion and order denying the petition for reconsideration and affirming its previous order. CPVA then filed a petition in this court for review of the memorandum opinion and order. The two petitions were consolidated.

While CAPH's rulemaking petition was pending before the FCC, CAPH filed suit in February 1979 against the FCC and CBS. CAPH requested that the District Court order the same relief which CAPH sought before the agency: the promulgation of rules under Section 504 regarding employment of the handicapped and the extension of the EEO rules applicable to women and minorities to the handicapped. After the filing of the FCC report and order on March 6, 1980, the District Court dismissed CAPH's suit against the FCC and CBS. In a decision rendered March 10, 1980, the District Court found that it lacked subject matter jurisdiction in light of the FCC action taken on March 6. The District Court also denied CAPH's motion for attorneys' fees made under Section 505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b), 496 F.Supp. 125. CAPH then appealed the District Court's decision, which was later consolidated with the petitions for review.

DISCUSSION

Section 504

Section 504 of the Rehabilitation Act provides that no otherwise qualified handicapped individual, solely by reason of the handicap, shall be subjected to discrimination under any program or activity receiving federal financial assistance.[1] CAPH contends that broadcast licenses are a form of federal financial assistance and that the FCC must therefore issue regulations implementing Section 504.

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[1] 29 U.S.C. §794 provides, *inter alia:*

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

Contrary to CAPH's contention, however, it is now clear that broadcast licenses are not a form of federal financial assistance within the context of Section 504. In *Community Television of Southern California v. Gottfried,* ____ U.S. ____, 103 S.Ct. 885, 892, 74 L.Ed.2d 705 (1983), the Supreme Court held that the FCC is not a funding agency and has no responsibility to enforce Section 504. Thus, Section 504 does not require the FCC to issue the regulations which CAPH requests.

2. *Communications Act*

CAPH argues next that even if Section 504 does not require the FCC to issue the requested regulations, the Communications Act does impose such a requirement. CAPH contends that the FCC's duty under the Communications Act to pursue the public interest[2] requires the agency to establish regulations implementing the national policy in favor of the handicapped as reflected in Section 504 of the Rehabilitation Act. In particular, CAPH argues that the public interest standard requires the FCC to (1) forbid employment discrimination against the handicapped, (2) promote ownership and management of broadcasting facilities by the handicapped, and (3) demand a barrier-free environment for the handicapped in broadcasting facilities.

The Supreme Court's decision in *Gottfried,* however, precludes this argument. The court ruled that Congress had not "intended the Rehabilitation Act of 1973 to impose any new enforcement obligation on the Federal Communications Commission," and that the public interest standard of the Communications Act was insufficient to

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[2]47 U.S.C. §307(c) (1983 Supp.) provides, *inter alia,* that the FCC is directed by statute to grant an application for renewal of a broadcast license if it finds that the "public interest, convenience, and necessity would be served thereby."

create any obligation to enforce Section 504 or incorporate that section's standards into the Communications Act. *Gottfried,* 103 S.Ct. at 892 and n. 14.

3. *Equal Protection*

CAPH contends that the FCC deprived handicapped persons of equal protection when the agency refused to include the handicapped in its EEO program designed to preclude discrimination against women and racial minorities. CAPH argues that the handicapped should be considered a suspect class, and that under the strict scrutiny standard applicable to a suspect class, the FCC's action should be held unconstitutional. No appellate court, however, has held that the handicapped are a suspect class. *Brown v. Sibley,* 650 F.2d 760, 766 (5th Cir.1981). We decline to be the first.

CAPH argues that even under that rational basis test applicable to distinctions involving non-suspect classifications, the FCC's refusal to include the handicapped in the EEO program was still a violation of equal protection. This argument is without merit. Treating two groups differently does not necessarily violate the equal protection. *See Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The FCC claimed that in light of problems unique to handicapped persons, setting up an EEO program to monitor employment of the handicapped by FCC licensees required more resources and expertise than was required for similar programs designed to prevent employment discrimination against women and minorities. Because the FCC's justification of its refusal to include the handicapped in its EEO program was reasonable, the FCC did not violate equal protection under the rational basis test. *See McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

4. *Subject Matter Jurisdiction In District Court*

CAPH's action sought an order directing the FCC to (1) promulgate a Section 504 regulation, and (2) refrain from denying equal employment opportunities to qualified handicapped persons. Although the Court of Appeals has exclusive jurisdiction to review final orders of the FCC, *see* 28 U.S.C. §2342(1); 47 U.S.C. §402(a) (1983 Supp.), CAPH argues that the District Court still erred in dismissing the complaint. According to CAPH, the District Court had jurisdiction under two different theories: (1) through application of 28 U.S.C. §2347(b)(3); and (2) because CAPH asserted substantial violations of constitutional rights.

Section 2347(b)(3) provides no help to CAPH. This section merely provides for a transfer from the Court of Appeals to the District Court when the appellate court has determined that an agency hearing is not required by law and that a genuine issue of material fact remains unresolved. CAPH offers no authority to support the proposition that §2347(b)(3) provides the District Court with jurisdiction in the first instance.

CAPH's second argument also lacks merit. The presence of a constitutional issue is sufficient to grant the District Court jurisdiction where jurisdiction would otherwise exist only in the FCC and the Court of Appeals. In *Writers Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir.1979), *cert. denied*, 449 U.S. 824, 101 S.Ct. 85, 66 L.Ed.2d 27 (1980), this court was presented with an argument similar to CAPH's argument here. In *Writers Guild*, we stated:

> While we agree that the [action of] the FCC presents serious issues involving the Constitution, the Communications Act, and the APA, we nevertheless believe that the district court should not have thrust

> itself so hastily into the delicately balanced system of broadcast regulation.

Id. at 365 (footnote omitted). Statutory and constitutional claims against the FCC are not initially cognizable in federal District Court. CAPH's constitutional claim against the FCC, therefore, was insufficient to give the District Court subject matter jurisdiction.

5. *Attorneys' Fees*

CAPH's final argument on appeal is that the District Court erred when it dismissed CAPH's motion for attorneys' fees on the ground that it did not have jurisdiction to grant the motion.[3] While we hold that the District Court did not err in dismissing CAPH's motion, the District Court did err by basing its holding on lack of jurisdiction.

CAPH sought an award of attorneys' fees under Section 505(b) of the Rehabilitation Act. This section provides that a court can award a prevailing party attorneys' fees in "any action or proceeding to enforce or charge a violation of a provision" of 29 U.S.C. § § 790, *et seq.*, 29 U.S.C. § 794a(b). The Supreme Court, however, has held that Congress' use of the phrase "any action or proceeding" demonstrates its intent to authorize civil suits in federal court solely to obtain an award of attorneys' fees for legal work done in administrative proceedings. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 66, 100 S.Ct. 2024, 2032, 64 L.Ed.2d 723 (1980)[4] Thus, the

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[3]In view of our decision on the issue of attorneys' fees, we conclude that no party was prejudiced when the panel granted CAPH's counsel's motion to allow counsel to briefly argue the single issue of attorneys' fees. Although CAPH's counsel was the only party present at oral argument, all counsel were notified by phone that the court had granted the limited oral argument. The procedure adopted was merely to facilitate the hearing of this appeal. The suggestions coming after submission for further oral argument are denied.

[4]In *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 100 S.Ct.

District Court erred when it held that it did not have jurisdiction to award attorneys' fees.

Although we would ordinarily remand the case to the District Court for a determination of the attorneys' fees issue, we need not remand where resolution of factual issues is unnecessary. *United States v. Ford,* 650 F.2d 1141, 1144 (9th Cir.1981), *cert. denied,* 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (1982). Here, remand is unnecessary. CAPH requested attorneys' fees under Section 505(b) of the Rehabilitation Act. For the reason discussed below, CAPH cannot legally qualify as a prevailing party under Section 505(b).

In *Fitzharris v. Wolff,* 702 F.2d 836 (9th Cir.1983), we discussed two possible elements of a test for determining whether a plaintiff is a prevailing party. The first element—required by our previous decisions—is a factual one: the District Court must determine what the lawsuit sought to accomplish and then determine whether it was accomplished by means of the suit. *Id.* at 838. The second possible element is a legal one: whether there was a legal basis for the plaintiff's claim. The First Circuit requires such an element: "If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau v. Helgemoe,* 581 F.2d 275, 281 (1st Cir.1978). We noted in *Fitzharris* that

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2024, 64 L.Ed.2d 723 (1980), the Supreme Court interpreted the attorneys' fees provisions of Title VII, 42 U.S.C. §2000e-5(k). The similar legislative histories and wording of the Title VII and the Rehabilitation Act attorneys' fees sections compel the conclusion that the courts must interpret the "any action or proceeding" language of both statutes in the same manner. *Compare* 110 Cong.Rec. 12724 (1964) (remarks of Sen. Humphrey concerning Title VII) *with* 124 Cong.Rec. 18999-19000 (1978) (remarks of Sen. Stafford concerning the Rehabilitation Act).

we had not previously decided whether to adopt this second element, and we found it unnecessary to decide the question at that time since the plaintiff had met both elements. *Fitzharris,* 702 F.2d at 838.

Here, however, the FCC's appointment of a "co-ordinator for broadcasting and the handicapped" was not required by Section 504 of the Rehabilitation Act.[5] FCC's action, therefore, was gratuitous, at least with respect to the Section 505(b) attorneys' fee provision upon which CAPH relies.[6] Thus, we are now squarely presented with the issue we left open in *Fitzharris*. We now hold that a plaintiff cannot be a prevailing party where a defendant's action is only gratuitous. Consequently, CAPH is not a prevailing party since it fails to meet the legal element of our definition of a prevailing party. The District Court did not err in dismissing the attorneys' fee claim.

The District Court's dismissal of appellants' action is affirmed, and the petitions for review are denied.

AFFIRMED.

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[5]The Supreme Court's decision in *Gottfried* clearly states that the FCC is not a funding agency and therefore has no obligation to enforce Section 504. *See* discussion of Section 504 in text above.

[6]Section 505(b) authorizes an award of attorneys' fees only for actions to enforce Title V of the Rehabilitation Act, 29 U.S.C. § § 790, *et seq*. Therefore, unless Section 504 forms the required legal basis for the FCC's action, the action is gratuitous with respect to an award of fees under Section 505(b). Thus, it is irrelevant whether the FCC's action was gratuitous with respect to the Communications Act. Even if the Communications Act required the FCC to take the action, CAPH could not collect.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 80-62
15542

In the Matter of	)	
	)	Docket No. 21474
Amendment of Broadcast Equal	)	RM-1968
Employment Opportunity Rules	)	RM-2810
and FCC Form 395.	)	RM-2978
	)	
	)	

SECOND REPORT AND ORDER

Adopted: February 13, 1980 ; Released: March 6, 1980

By the Commission: Commissioner Lee concurring in part and dissenting in part and issuing a statement; Commissioner Fogarty issuing a separate statement in which Chairman Ferris joins; Commissioner Jones concurring in part and dissenting in part.

1. Presently before us is the matter of including the handicapped in our equal employment opportunity ("EEO") rules, as addressed in our *Further Notice of Proposed Rule Making,* FCC 78-468, released July 7, 1978, 43 Fed. Reg. 30078, published July 13, 1978, and the comments and reply comments filed in response to that *Notice*.[1]

[1]Comments were due by August 29, 1978; reply comments were due on or before September 13, 1978. On August 1, 1978, in response

Background

2. A brief history of this proceeding will provide the proper perspective for resolving the issues raised in this matter. On November 18, 1977, we issued a *Notice of Proposed Rule Making,* 66 F.C.C. 2d 955, regarding the amendment of Form 395, the Annual Employment Report, as to minorities and women.[2] The *Notice* set forth a number of alternatives which had been suggested to remedy the problems of misclassification of employees in Form 395 reporting. Subsequently, in our *Further Notice,* we observed that a petition, RM-2978, had been filed by the California Association of the Physically Handicapped, Inc. ("CAPH") on September 28, 1977, requesting the inclusion of qualified handicapped persons in the EEO programs required of our broadcast licensees, and other and related relief. We determined that the issues raised by CAPH might best be addressed in this, the Form 395 proceeding. On January 29, 1979, we issued our *First Report and Order* in this Docket, 70 F.C.C. 2d 1466. We announced that we had decided to revise the instructions for completing Form 395 as one method by which to resolve the misclassification problem. We declined at that time to adopt a proposal which would have required the reporting of salaries as a method by which to verify the categorization of employees on Form 395, but left the verification issue open for further action.[3] We noted in the

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to a request of the National Association of Broadcasters ("NAB"), we extended the deadline for comments to September 15, 1978, and for reply comments to October 2, 1978. BC-3745, August 3, 1978.

[2]Broadcast licensees with five or more full-time employees are required to annually file with the Commission a completed Form 395 wherein they report the number of their full-time and part-time employees by sex and specified racial and ethnic groupings within each of nine general job categories.

[3]A *Notice of Proposed Rule Making* encompassing this matter will be forthcoming.

First Report and Order that additional time was necessary for consideration of the aspect of this proceeding relating to handicapped individuals.

3. In our *Further Notice,* we stated that we were considering amendment of our broadcast EEO rules[4] to include the handicapped and considering such changes in Form 395 as might be necessary to effectuate the purposes of the amended rules. While noting that comments on any aspect of the proposal would be welcomed, we specifically solicited comments on the following matters: (a) whether the handicapped should be included in our EEO rules; (b) what definitions might be used and what categories of handicapped persons should be included or excluded under any rule; (c) to what extent if any, a licensee should be required to modify its facilities to accommodate a physically handicapped employee; and (d) what laws, if any, applicable to licensees require facilities modification. We stated that comments making reference to the practical application of other laws and regulations regarding employment of the handicapped would be helpful. We noted that CAPH's petition requested that we go beyond EEO issues to consider action to increase broadcast ownership and management by physically handicapped persons, indicating that comment was also solicited on these matters. Specifically, CAPH suggested that the Commission consider giving preference to a new station

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[4]The *Further Notice* proposed to amend "our broadcast EEO rules," these being Sections 73.125, 73.301, 73.599, 73.680, and 73.793. Section 73.793 was inadvertently referred to in the *Further Notice* as 73.993. The intent of the *Further Notice* was clearly stated and there can be no prejudice to any party as a result of this improper citation. By action announced in the *First Report and Order* in this proceeding, these identically worded sections, which were applicable separately to each broadcast service, have been replaced with Section 73.2080; applicable in common to all broadcast services. Our EEO rules require both nondiscrimination and affirmative action.

applicant if the physically handicapped constitute a substantial part of ownership and management, as well as considering the ownership and management participation by physically handicapped individuals in connection with license renewal applications.

Comments

4. The threshhold issue discussed by both proponents and opponents of Commission action in this area is that of jurisdiction; that is, whether we are mandated or permitted by the Communications Act or any other statutes to include the handicapped in our EEO rules. CAPH and other proponents of Commission action expound two basic arguments in support of their assertion that we are both authorized and required to expand our EEO requirements to encompass handicapped individuals.

5. The first contention in favor of jurisdiction is essentially parallel to the argument employed by the Commission when it first asserted authority regarding EEO in 1968.[5] The proponents contend that there is a national policy to promote and expand employment opportunities for handicapped individuals. This policy, they suggest, is embodied primarily in Sections 503 and 504 of the Rehabilitation Act of 1973, as amended ("the Rehabilitation Act"), 29 U.S.C. §701 *et seq.*, in the White House Conference on Handicapped Individuals Act, T. III of Pub. L. 93-516, December 7, 1974, 88 Stat. 1631-1634, and in related Executive Orders, rules and regulations.[6] Additionally, proponents suggest, handi-

[5] *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices,* 13 F.C.C. 2d 766 (1968).

[6] Section 503 of the Rehabilitation Act of 1973 mandates inclusion of a provision that the contractor will enter into affirmative action to employ and advance qualified handicapped persons in most Federal

capped individuals constitute a particular minority with distinct tastes and views presently unserved by licensees. This argument suggests the nexus between equal opportunity in employment and provision of service to minorities within a community by our licensees which has been enunciated as the basis for our affirmative action EEO requirements and cited with approval by the Supreme Court.[7] Therefore, proponents conclude, our obligation to regulate in the public interest requires that we incorporate the handicapped in our EEO rules.

6. The proponents' second jurisdictional argument for including the handicapped in our EEO rules is based on Section 504 of the Rehabilitation Act. The proponents argue that a broadcast license is a monopoly interest granted by the Federal government. Since the licensee profits from the operations made possible by the license, proponents argue, the licensee is in effect a recipient of Federal financial assistance. Therefore, it is submitted, a broadcast licensee is directly subject to the mandates of Section 504 and the Commission is obligated to implement that Section.

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contracts in excess of $2,500. Section 504 of that Act, on which proponents place most emphasis, states in part that no otherwise qualified handicapped individual shall, solely by reason of his or her handicap, ". . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." In the White House Conference on Handicapped Individuals Act, Congress found in pertinent part that ". . . it is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps. . . ." The Act authorized the President to call a conference, held in 1977, to develop recommendations and action plans to solve the problems of handicapped individuals.

[7] *NAACP v. FPC*, 425 U.S. 662, 669-670, n.7 (1976).

7. Those opposing inclusion of the handicapped in our EEO requirements generally argue that we are neither permitted nor mandated to do so. Thus, some opponents argue that there is no national policy as to employment discrimination against the handicapped. In that vein, commenters such as the NAB state that the Rehabilitation Act's provisions are directed only to businesses or organizations which have contracts with or receive financial assistance from the Federal government. Simply put, opponents state, CAPH and its supporters have read the Rehabilitation Act's mandates too broadly. Other commenters opposing our action in this area, such as CBS, Inc., argue that there is no deficiency in licensee programming with respect to the viewpoints and tastes of handicapped persons. CBS suggests that the viewpoints and tastes of handicapped persons are in large measure those of the general population; whereas, the National Radio Broadcasters Association ("NRBA") asserts that because of the diverse nature of "the handicapped" as a group, the viewpoints and tastes in question are not clearly discernable, making it particularly difficult to determine whether there is appropriate programming to be fashioned. These comments attempt in this manner to refute the employment/programming nexus referred to above as the basis for our involvement in affirmative action EEO matters. Absent such a showing, opposing commenters suggest, we are without jurisdiction to expand our EEO requirements to include the handicapped under the public interest standard of the Communications Act. Opposing comments as to the direct applicability of Sections 503 and 504 to broadcast licensees put forth the view that broadcasters are not Federal contractors (Section 503) nor do they receive Federal financial assistance (Section 504), rejecting the proponents' analysis that a license is in effect a grant of Federal financial assistance.

8. Our request for comment as to what definitions might be applied if we include the handicapped in our EEO rules generated a substantial response. Those proponents of a rule commenting on this point generally support use of the definition adopted by the Department of Health, Education and Welfare ("DHEW"), which is charged with coordination of Section 504 implementation through Executive Order 11914, 41 Fed. Reg. 17871, April 28, 1976.[8] This is the definition which was also

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[8]The Department of Health, Education and Welfare's comprehensive definition, 45 C.F.R. §84.3(j), is as follows:

> "(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.
>
> (2) As used in paragraph (j)(1) of this section, the phrase:
>
> (i) "physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as

commented on most frequently by those opposed to any Commission action in this matter. Opponents variously describe DHEW's definition as being overly broad, imprecise, confusing and unworkable. A number of opponents point out that DHEW itself found it impossible to define the term "substantially limits" in subsection (j)(l)(i), which reads in part: " 'Handicapped persons' means any person who . . . has a physical or mental impairment which substantially limits one or more major life activities. . . ." *Analysis of Final Regulations,* 42 Fed. Reg. 22676, 22685 (May 4, 1977).

9. Comments opposing inclusion of handicapped persons in our EEO rules were frequently quite detailed, while the preponderance of supporting comments were in the nature of general statements. Thus, some opposing comments include lengthy presentations of the supposed difficulties of identifying handicapped persons and implementation of an appropriate program to serve their needs. American Broadcasting Companies, Inc. ("ABC") suggests that any definition of "handicapped person" utilized will necessitate, for implementation purposes, *ad hoc* medical evaluations beyond the resources of the Commission or most licensees. This situation is distinguished from those involving race, sex, or national origin, which commenters suggest can be described in terms commonly understood and readily applied. The situation is further complicated by privacy issues, many commenters assert, stating that inquiries as to whether an individual is handicapped are improper intrusions into a person's privacy.

10. Commenters such as the Paralyzed Veterans of America, the National Federation of the Blind, and the

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a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment."

National Center for Law and the Deaf support the inclusion of "handicapped" as a Form 395 reporting category. Many opposing comments on this point raise the privacy issue, suggesting in addition that persons with handicaps not readily ascertainable may not wish to disclose them, thus making any data reported to the Commission of questionable accuracy. Further, many commenters suggest that no meaningful data base exists by which the number of handicapped employees in a station's employ might be compared to the number of such individuals in the station's area labor force. In effectuating the Commission's EEO program, the percentage of minority and women employees in a station's workforce is compared for processing purposes with the percentage of similar individuals in the station's area labor force. The licensee's workforce should compare favorably to the overall labor force within what we have described as a "zone of reasonableness." NRBA suggests that there is U.S. Census data available by which to make such a comparison, but that the data is based upon self-reported work disability, which does not directly correlate with DHEW's definition of "handicapped." Further, NRBA comments, work disability in the population fluctuates by Standard Metropolitan Statistical Area ("SMSA") and region due to such diverse variables that a gross statistical comparison of employment data reported on Form 395 with such a base would produce a meaningless result. Field Communications Corporation states that it might have no objection to including the handicapped in Form 395, but cannot comment with certainty because we did not propose a specific definition in our *Further Notice.* The Office of Communication and Board for Homeland Ministries of the United Church of Christ ("UCC") suggests that we need to tailor any EEO action to the special needs of handicapped people, and that the "mere

insertion" of handicapped as a Form 395 category would be of no real value to handicapped people but could dilute the effectiveness of EEO enforcement for women and minorities.

11. Many responses were received to our request for comments on the extent to which a licensee should be required to modify its facilities to accommodate a physically handicapped employee. Proponents of the need for "reasonable accommodation," such as the United Cerebral Palsy Association and the National Association of Broadcast Employees and Technicians, recommend following the regulatory definitions adopted by either the U.S. Department of Labor ("DOL") or DHEW.[9] Other

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[9]DHEW's description of "reasonable accommodation," at 45 C.F.R. §84.12, is as follows:

> (a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
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> (c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program factors to be considered include:
>
> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
>
> (2) The type of the recipient's operation including the composition and structure of the recipient's workforce; and
>
> (3) The nature and cost of the accommodation needed.

commenters propose utilization of such modern technology as news printers equipped with braille print-out, modifying radio control boards for use by blind engineers, and installation of teletypewriter ("TTY") equipment for the hearing-impaired as appropriate. Mainstream, Inc. notes that only parts of facilities might need to be made accessible, while Galesburg Broadcasting and other commenters suggest that this is an issue which requires case-by-case resolution. The Easter Seal Society would require that licensees comply with the Architectural Barriers Act, 42 U.S.C. §4151 *et seq.* That Act requires that buildings constructed by the Federal government or with Federal funds be designed so as to be accessible to handicapped individuals.

12. Commenters opposed to the modification of facilities frequently suggest that it is not clear what degree of facilities modification would constitute "reasonable accommodation," and that requiring an active EEO program for handicapped persons, particularly one mandating "reasonable accommodation," would be unduly burdensome to licensees. We are also told that restructuring facilities may require a substantial expenditure of funds not justified by the limited utilization of these facilities by handicapped individuals.

13. Only limited comment was received on CAPH's proposal that the Commission institute a program to increase broadcast ownership and management by physically handicapped persons. CBS states that it is opposed to such a program because there has been no showing made of any relationship between handicapped status and

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(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

ownership. Streator Broadcasting Corporation states that it is opposed because there is no data showing inadequate representation of handicapped persons in ownership or programming.

14. In reponse to our request for comment on other laws regarding the handicapped, Streator identified statutes in all 50 states and the District of Columbia having some relevance to discrimination against handicapped individuals. Also submitted was a group filing by a number of licensees identifying employment-related statutes in almost 40 states.

Discussion and Conclusions

15. While recognizing the desire of numerous handicapped persons to be included in the Commission's EEO programs,[10] we must first address the issue of whether we are either authorized or required to act in the manner desired by petitioner. It is useful in this regard to briefly discuss the basis on which the Commission exercises jurisdiction over the employment practices of broadcast licensees. The Commission's primary statutory mandate, set forth in Section I of the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.*, is the regulation of interstate and foreign commerce by wire and radio, so as to make wire and radio communications services available to all the people of the United States. Under Sections 307

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[10]We note that court action has been instituted to force us to take the action petitioned for. *California Association of the Physically Handicapped v. FCC,* Civil No. CV 79-0644-WPG (C.D. Cal.); *California Paralyzed Veterans Association v. FCC,* Civil No. CV 79-0501-WPG (C.D. Cal.); *Berkosky v. Department of Labor,* Civil No. CV 79-1633-WPG (C.D. Cal.). Two related cases dealing in large part with captioning for the hearing-impaired are also pending: *Greater Los Angeles Council on Deafness v. Community Television of Southern California d/b/a/ KCET,* Civil No. 78-4715-R (C.D. Cal.); *Gottfried v. FCC,* No. 79-1722 (D.C. Cir.).

and 309 of the Act, we are charged with conducting the broadcast licensing process to the end that the "public interest" will be served thereby.

16. We first expressed our concern about employment discrimination in a 1968 *Memorandum Opinion and Order.*[11] In that document, we noted that there was a "national policy against discrimination in employment on the basis of race, religion, sex or nationality. . . ." which was "particularly embodied" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.* We then observed that broadcasters are licensed to operate in the public interest, and concluded that we could not make a finding that a broadcast applicant deliberately violating the national policy or preparing to do so could be said to serve the public interest. The thrust of our reasoning was that a violation of law raises questions as to an applicant's character and fitness to be a licensee.

17. Beyond the requirement that the law be obeyed, we stated our concern that the licensee who discriminated in employment might not be fulfilling its function as a "public trustee" to serve the entire public. The need to ensure that the licensee is making a good faith effort to serve its entire public so that the licensee's ". . . programming fairly reflects the tastes and viewpoints of minority groups. . . ."[12] is the cornerstone of our requirement that beyond mere nondiscrimination there must be affirmative action on the part of licensees.[13] As to specific complaints of discrimination, we announced our intention to refer these complaints

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[11] *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C. 2d 766 (1968).

[12] *NAACP v. FPC, supra.*

[13] See, for example, *National Organization for Women v. FCC*, 555 F. 2d 1002, 1017 (D.C. Cir., 1977).

in the first instance to appropriate Federal, State or local agencies if any had jurisdiction over the licensee whose conduct was in question and to take action on complaints of discrimination, if warranted, after the appropriate agency had an opportunity to evaluate the complaint.[14] Over the past decade we have developed and strengthened our EEO rules in accordance with our mandate to regulate communication by wire and radio in the public interest.[15] We have always recognized, however, that "the public interest mandate of a Federal regulatory agency is not a broad license to promote the general welfare. . ." and that "a

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[14]We have recently taken steps to formalize the referral process with the Equal Employment Opportunity Commission ("EEOC"), the relevant Federal agency. *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 F.C.C. 2d 2320 (1978). The Commission has always had and retains the authority to consider complaints of discrimination even absent a prior finding of another agency or a court.

[15]In 1969, we adopted specific rules requiring both nondiscrimination and affirmative action. *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C. 2d 240 (1969). These rules did not cover discrimination on the basis of sex. In 1970, we added sex discrimination to the previously adopted rules, and also instituted use of Form 395, the Annual Employment Report. *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C. 2d 430 (1970). Additionally, we instituted the requirement that equal employment opportunity programs be filed by renewal, transfer, assignment and construction permit applicants. We declined to add details on female employment to this requirement, but did take such action in 1971. *Equal Employment Program*, 32 F.C.C. 2d 831 (1971). In 1975, noting that the need for specific affirmative action implicit in our rules apparently was not clear to some licensees, we proposed to adopt a model Equal Employment Opportunity Program. *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C. 2d 354 (1975). Such action was taken in 1976. *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C. 2d 226 (1976).

general grant of authority to regulate in the 'public interest' does not authorize the regulation of employment discrimination *per se* . . . ." *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees,* 60 F.C.C. 2d 226, 229 (1976), citing *NAACP* v. *FPC, supra.* It is with this history in mind that we must treat the matter before us.

18. While national concern as to employment discrimination against handicapped individuals is clearly evidenced in Section 504 of the Rehabilitation Act, and in Section 503 as well, neither section makes private sector discrimination against handicapped persons illegal as such.[16] CAPH, the petitioner in this matter, notes in its own "Reply Comments" that Section 504 is almost identical to Section 601 of the Civil Rights Act of 1964 and Section 901 of the Education Amendments of 1972. All of these enactments, however, deal only with grantees of Federal financial assistance. Thus, even assuming that such Congressional enactments as exist constitute a "national policy" in some form, the nature of that policy is not the same as the absolute prohibition against discrimination embodied in Title VII of the Civil Rights Act which first led us to enter the EEO area.

19. Again, even assuming that there is in some fashion a "national policy," that finding alone would not require or make is advisable that we implement for handicapped individuals an EEO program of exactly the same sort as that which we presently have for minorities and women. It is helpful, in understanding why a distinction can and should be made, to turn to a comparison made by DHEW of Section 504 of the Rehabilitation Act with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[17] In a statement of its views,

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[16]As to Section 503, see *Wood v. Diamond State Telephone Co.,* 440 F. Supp. 1003, 1009 (D. Del., 1977).

[17]41 Fed. Reg. 20296, May 17, 1976.

DHEW concluded that Title VI and Title IX are premised on the notion that there is no inherent difference between the general public and members of the "protected groups" (minorities and women). Therefore, minorities and women should not be discriminated against. However, DHEW states, the premise of Section 504 is that handicapped persons may require different treatment than others in order to receive equal access.

20. The manner in which "handicapped person" has come to be defined by DHEW, the Federal government's expert agency in this area, further dramatizes this distinction. The individuals covered are so diverse that case-by-case employer/employee resolutions will frequently be necessary if all are to be treated fairly. The definition, for example, encompasses individuals who have suffered cosmetic disfigurement and, at the same time, individuals suffering from mental illness such that the illness substantially limits their life activities. Further, the definition includes not only those who have a physical or mental impairment but also those who are "regarded" as having impairment which limits their activities.

21. Similarly, were we to determine that "handicapped persons," viewed as an entity, in some manner have particular programming needs, that would not of itself require that we include handicapped persons in our present EEO program. For even if we conclude both that a national policy exists and that handicapped persons have unique and unserved tastes and views, a decision not to take the action requested remains within our discretion to determine the most appropriate methods by which to carry out our responsibilities.[18] The Commission has consider-

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[18]This is not to suggest that individuals with certain specific handicaps, such as the hearing-impaired, do not have specialized communications needs which it is properly within the province of the Commission to address. Neither do we conclude that handicapped

able discretion not to promulgate rules even when it has the authority to do so. Before expanding upon this point, we turn briefly to the matter of direct Section 504 applicability.

22. CAPH contends that Section 504 of the Rehabilitation Act applies directly to broadcast licensees because the benefits obtained by virtue of the license constitute Federal financial assistance. We have had occasion recently to treat this issue. *In the License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California*, 69 F.C.C. 2d 451 (1978), *reconsid. denied,* 72 F.C.C. 2d 273 (1979). In our initial decision in the Los Angeles renewal cases, we found that Section 504 did not appear to apply to commercial licensees. We also commented in our initial Los Angeles decision that certain noncommercial licensees might be recipients of "Federal financial assistance" covered by Section 504, and stated our intention to consider findings of Section 504 violations made by DHEW, the expert agency primarily responsible for its implementation, in our treatment of broadcast applications.[19]

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persons are not a significant community group whose needs must be ascertained by licensees. Licensees have a continuing obligation to ascertain the problems, needs and interests of significant elements of the community they are licensed to serve and to present programming responsive to these problems, needs and interests. Many licensees presently ascertain the needs of the handicapped in their community, but this is not required. We have recently proposed to amend the *Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants,* 57 F.C.C. 2d 418 (1976), so that ascertainment of significant elements in a community which are not specifically included in our nineteen category Community Leader Checklist would be required. This would, in many communities, include handicapped persons. *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applications in Regard to the Community Leader Survey,* 69 F.C.C. 2d 1815 (1978).

[19]We do note that certain commercial licensees may, directly or through their relationships with affiliated entities, be covered by

On reconsideration, we affirmed and explicated our views on this point. Inspecting DHEW's definition of what constitutes a program or activity receiving Federal financial assistance,[20] we concluded that as a license does not convey any property right or interest[21] and the Commission does not in the normal course of its business make payments or provide any other "financial assistance" to licensees, the mere grant of an application by the Commission does not submit a licensee to the requirements of Section 504.[22] [23]

Section 503 provisions because the licensee or related entity is a Federal contractor. We would consider formal findings of Section 503 violations made by an agency or court with jurisdiction. We also note our intention to consider formal Section 504 findings made by any agency or court with jurisdiction. DHEW, while the lead agency, is not the only agency involved, and court action is also possible. We did not mean to imply in our Los Angeles decisions that we would limit our consideration only to DHEW's actions. Additionally, we do have jurisdiction under the public interest standard to consider alleged violations of law even before findings made by another agency, and circumstances may arise where such action would be appropriate.

[20]Defined by DHEW at 45 C.F.R. §85(e) to include: . . . any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(a) Funds;
(2) Services of Federal personnel; or
(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

[21]See Sections 301 and 304 of the Communications Act, as amended, *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1970), *Ashbacker Radio Corporation v. FCC,* 326 U.S. 327, 331-332 (1945).

23. Upon further consideration of the Section 504 issue, the Commission remains convinced that Congress did not intend the grant of a license to constitute Federal financial assistance. While the legislative history of Section 504 is sparse, that section in its operative terms is identical to the provisions of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d). It is apparent that by using identical terminology in Section 504 Congress meant to give its provisions the same meaning as those in Title VI. Moreover, in adopting the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, Congress showed clearly that it intended Section 504 to have the same reach as Title VI. For these reasons, the legislative history of Title VI must be considered controlling in determining the intent of Section 504. The legislative history of Title VI shows clearly that Congress did not intend that the grant of a Federal license would be interpreted as "Federal financial assistance." To the contrary, an examination of the legislative history of Section 601 reveals that Congress intended the term "Federal financial assistance" to be understood in its ordinary meaning as funds and real or personal property. See, *e.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess.,

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[22]Similarly, we are not an agency charged by Executive Order 11914 with Section 504 implementation.

[23]The Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. 95-602 (November 6, 1978), amended Section 504 to cover participation in programs or activities conducted by any executive agency. While the Commission is not an executive agency, there is some support for the view that Congress also intended this amendment to apply to independent regulatory agencies. The legislative history and the Supreme Court's recent decision in *Southeastern Community College v. Davis*, ____ U.S. ____, 99 S. Ct. 2361 (1979), make it clear that this amendment only applies to an agency's own internal employment practices.

reprinted in [1964] U.S. Code Cong. & Admin. News 2355, 2511-12. *See also*, Civil Rights: Hearings before the House Judiciary Committee, 88 Cong., 1st Sess. 2731 (1963) (statement of Attorney General Robert F. Kennedy). Moreover, the contemporaneous administrative interpretation of the term "Federal financial assistance" as used in the Title VI context refutes the petitioner's assertion that the term includes the granting of licenses. As the agency responsible for coordination of implementation of Title VI, the Justice Department worked with all affected Federal departments and agencies required to issue Title VI regulations. The Commission was not advised to issue Title VI regulations by the Justice Department because it was the judgement of the Department that the Commission does not provide any "Federal financial assistance" within the meaning of Title VI. Accordingly, the Commission's grant of a broadcast license does not constitute "Federal financial assistance" within the meaning of Section 504. Having thus considered this issue again in this Docket, we are of the view that our determination as to the general inapplicability of Section 504 as set forth in the Los Angeles renewal cases was correct.

24. Even were petitioner and its supporters more successful than inspection has shown them to be in paralleling the rationale by which we have authority to require affirmative action in the employment practices of broadcast licensees as to minorities and women, we would still choose to exercise our discretion not to use that authority. Among the reasons for this decision is the unique nature of the situation of handicapped persons as compared to the areas of sex and race/ethnicity to which our present program is directed. It is apparent to us, for example, that data collection of the nature we presently do with Form 805 would not be viable as to handicapped

persons, because of problems of definition, identification, and privacy. Some individuals who qualify as "handicapped" under DHEW's definition might well not wish to disclose an otherwise unapparent handicap. Additionally, the data base by which we compare an employer's workforce to its area labor force in order to ascertain performance does not exist in the same form for handicapped persons as it does for race and sex. Census data on the handicapped covers self-reported work disability and does not correlate directly with DHEW's definition. It would also seem that the issue of "reasonable accommodation" must be handled on a case-by-case basis because an employer must accommodate a particular handicap in the context of a particular job and worksite.

25. The Commission's present EEO program is geared largely to systemic discrimination; individual complaints of discrimination are, if the employer is above the jurisdictional limit, referred to the Equal Employment Opportunity Commission. Our model EEO program is based upon the premise that a pool of individuals with relevant skills who can be readily identified exists, and that it is the responsibility of the licensee to recruit and employ these individuals in a reasonable relationship to their presence in the labor force. It appears to us that this systemic approach would not be effective as to the handicapped. The Commission lacks both the staff and the expertise to make numerous judgements on individual cases related to handicapped persons. Further, absent a specific legislative mandate we are extremely reluctant to impose requirements which will require substantial expenditures for modification of facilities which may then be used by only one person for a limited period of employment. For the reasons stated aforesaid, we also decline to adopt a program to enhance ownership and management by the physically handicapped. We note that even when restricted

to the physically handicapped, the definition problem would make implementation quite difficult. Furthermore, obstacles to ownership and management such as would suggest the need for a program were not shown in this proceeding.

Our Future Course

26. Although we have determined that it is inadvisable to include handicapped persons in our existing EEO rules, the model EEO program, or as a Form 395 category, we are taking meaningful action to aid the handicapped in having their needs met and their legal rights protected. As we observed when we first considered the matter of EEO more than a decade ago, an established violation of law clearly raises a question as to an applicant's qualifications to be a broadcast licensee. 13 F.C.C. 2d at 768-769 (1968). We announce our intention, as suggested in the Los Angeles renewal cases, to consider a finding of illegal discrimination on the basis of handicap made by any Federal, State or other governmental agency designated by law to make such a determination, or such finding made by any court of competent jurisdiction, as bearing on the character of an applicant for a broadcast license. Our consideration will be made in accordance with our normal procedures as to character issues.

27. Several commenters in this proceeding suggest that the Commission institute a program of an informational nature to facilitate the hiring of handicapped persons. We have determined that a clearinghouse program, which would provide information to licensees regarding methods of facilities and equipment modification, equipment availability, and other means by which to increase employment of and service to handicapped individuals, would be a proper service for the Commission to institute. Therefore, we hereby announce our intention to designate a co-

ordinator for "broadcasting and the handicapped," to be located in the Commission's Office of Public Affairs. The coordinator will have adequate staff support. It is our intent that the coordinator provide information to licensees on methods by which they may facilitate and increase employment of handicapped persons in all phases of licensee operations. The coordinator is also empowered to work with handicapped individuals and interest groups to increase awareness of opportunities for employment in the broadcast field. We believe that this action is in keeping with the spirit of recent Congressional enactments regarding the handicapped.

28. We would also like to draw attention to several other important actions recently taken in this area. On November 20, 1979, we adopted a *Notice of Proposed Rule Making* in PR Docket 79-315, which looks to reallocation of two low-band radio channels so that handicapped persons can communicate by means of a tactile (vibrating) paging device. This unit would, for example, enable parents to summon a deaf child home from play. Our concern that the communications needs of the hearing-impaired be provided for is also reflected in the issuance of a *Notice of Inquiry into Telecommunications Service for the Deaf and Hearing-Impaired,* 67 F.C.C. 2d 1602 (1978). Additionally, we have promulgated rules which make closed captioning of television programs possible, and note that DHEW has announced a cooperative closed captioning project with PBS, NBC, and ABC which will result in significant amounts of captioned program service by early 1980.[24] Our recent action

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[24] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf,* 63 F.C.C. 2d 378 (1976). Closed captioning requires use of a decoder in order to make the caption visible. Under the DHEW

regarding the ascertainment of handicapped individuals by broadcast licensees has already been described in this document. We trust that, in establishing a coordinator for "broadcasting and the handicapped" by the present *Report and Order*, we will have taken another important step in our ongoing effort to enhance communications services to and for handicapped persons.

29. Accordingly, IT IS ORDERED, That, pursuant to the authority contained in Sections 4(i), 303(g), and 303(r) of the Communications Act of 1934, as amended, the policies as set forth herein are ADOPTED, and this aspect of this proceeding is hereby TERMINATED.[25]

30. For further information concerning this proceeding, contact Steven A. Bookshester, Broadcast Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION*

William J. Tricarico
Secretary

*See attached Statement of Commissioner Lee and Separate Statement of Commissioner Fogarty in which Chairman Ferris joins.

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project, Sears, Roebuck & Co. wil sell decoders on a non-profit basis. See *Broadcasting Magazine*, March 26, 1979, at 32-33, for details of the DHEW project.

[25]On September 15, 1978, the NAB filed a motion to sever our proceeding related to handicapped persons from Docket 21474. Comments in support of the NAB motion were also filed. In its main comments in this proceeding, filed on the same date, NAB requested that we terminate this phase of the proceeding or, in the alternative, grant its motion to sever. As we have in this document announced our intention not to adopt any new rule, and to terminate this phase of Docket 21474 with this *Report and Order*, we do not reach the merits of NAB's motion.

Appendix A

Formal and Informal Comments

Governor's Committee on Employment of the Handicapped (W. Va.)
Maryland Office for the Coordination of Services to the Handicapped
National Association of Broadcasters
National Braille Press, Inc.
Alan L. Weiser
WCEC Radio
United Cerebral Palsy Associations Inc.
Metromedia, Inc.
San Francisco Public Library Communications Center
Los Angeles City Council for the Handicapped (Severin Grabin)
Bates County Broadcasting Company
Gregg R. Thompson
The Washington Ear, Inc.
State of New York, State Advocate for the Disabled
Board of Trustees, The California State University and Colleges (for KPBS-TV)
Broadmoor Broadcasting Corporation
Affiliated Leadership League of and for the Blind of America
National Trust for Historic Preservation
Fran C. Schmidt
Mainstream, Inc.
The Indoor Sports Club, Inc.
California Governor's Committee for Employment of the Handicapped
WBZK Radio
Paul J. McGeady
Central Ohio Radio Reading Service
American Alliance for Health, Physical Education & Recreation

Houston Gay Political Caucus
Michael A. Chatoff
Ohio Association of Broadcasters
Arizona Broadcasters Association
Disabled in State Service
Stebbins Communications, Inc.
Mayor's Office for the Handicapped, City of New York
National Easter Society for Crippled Children and Adults
The President's Committee on Employment of the Handicapped
Epilepsy Foundation of America
KNFM Radio
Broadcast Financial Management Association
National Association of Broadcast Employees and Technicians, AFL-CIO
Tallahassee Broadcasting Company
Combined Communications Corporation and Gaylord Broadcasting Company (and their subsidiaries)
Screator Broadcasting Corporation
Maryland-District of Columbia-Delaware Broadcasters Association, Inc.
Galesburg Broadcasting Co. and Citizens Group for the Physically Handicapped
Harte-Hanks Southern Communications, Inc. and Basic Media, Ltd.
National Radio Broadcasters Association
Haley, Badar & Potts
Field Communications Corporation
National Center for Law and the Deaf and the National Capital Area Coalition of Citizens with Disabilities
Nationwide Communications, Inc.
CBS, Inc.
Forward Communications Corporation (and subsidiaries)
Group One Broadcasting Co. (and affiliates)
Guaranty Broadcasting Corporation

John H. Phipps Broadcasting Stations, Inc.
May Broadcasting Company
Plains Television Corporation
Southern Television Corporation
Sumit Radio Corporation
Winnebago Television Corporation
WKRG-TV, Inc.
Michiana Telecasting Corporation
Public Broadcasting Service
National Federation of the Blind*
Pennsylvania Association of Broadcasters*
Paralyzed Veterans of America*
Deaf Counseling, Advocacy and Referral Agency*
Bonneville International Corporation*
Dow, Lohnes & Albertson*
Office of Communication and Board for Homeland Ministries of the United Church of Christ*
WRN ↄ Radio*
Colorado Broadcasters Association*

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*The comments marked with an asterisk were late-filed but since their consideration is not prejudicial to any party and their lateness did not exceed a few days, we shall consider them in this proceeding.

Reply Comments:

American Broadcasting Companies, Inc.
Broadcast Financial Management Association
Storer Broadcasting Company
California Association of the Physically Handicapped, Inc.*

STATEMENT OF COMMISSIONER ROBERT E. LEE CONCURRING IN PART AND DISSENTING IN PART IN RE: AMENDMENT OF BROADCAST EQUAL EMPLOYMENT OPPORTUNITY RULES AND FCC FORM 395.

My dissent is to that part of the Commission's decision creating a "clearinghouse" for information to facilitate the hiring of handicapped persons. I don't mean to be insensitive to the problems the handicapped face in the job market, and I certainly encourage broadcasters and others connected with telecommunications to hire handicapped persons.

My concern with the clearinghouse is the scope of its function. There is no realistic way the FCC can become expert about the myriad handicaps which afflict people or the design of buildings and equipment to accommodate these handicaps. Our expertise is electronic communications. Within the scope of our authority under the Communications Act, we have encouraged broadcasters and common carriers to make their services available to the handicapped, particularly the hearing impaired, and I expect to continue to do so.[1] But our expertise in electronics is of little value in designing the work environment for handicapped individuals.

Rather than divert personnel from other jobs in the Commission to perform what is, at best, a "busybody" function, I would like to see the Commission encourage both communicators and the handicapped to work with public and private organizations specializing in problems faced by the handicapped. We can't duplicate that expertise and we shouldn't. Referring people with questions to the appropriate organization is a much more appropriate function for us than running a clearinghouse.

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[1]Because of restrictions on ex parte communications, participation in docketed proceedings by clearinghouse personnel will be limited.

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY
IN WHICH CHAIRMAN CHARLES D. FERRIS JOINS

In Re: Second Report and Order in Docket 21474—Petitions for Inclusion of Handicapped Persons in EEO Rules and Form 395.

The handicapped have a unique and strong claim on this nation's social conscience and public policy. Their right to "life, liberty, and the pursuit of happiness" is no less compelling than that of any other American, and, in a deep and real sense, the full recognition of their rights, aspirations, and potential for contribution is proving to be one of the greatest challenges to our democratic society and its fundamental humanist principles.

It is therefore with considerable reluctance that I feel constrained to join in the Commission's decision declining to include "handicapped persons" within the purview of our existing rules and policies on equal employment opportunity for minorities and women. However, as this *Second Report and Order* explains in detail, any assertion of Commission jurisdiction requiring nondiscrimination and affirmative action for the handicapped would have to rest on the most tenuous of grounds, and implementation of such a program would be so fraught with administrative uncertainty and difficulty as to vitiate any practical effectiveness.

Here, I believe it is particularly important to emphasize that the Commission is not ignoring the needs and legal rights of the handicapped as they relate to our regulatory responsibilities and mission. We have a clear duty to consider a finding of illegal discrimination against the

handicapped made by a competent authority as reflecting adversely on the character of broadcast license applicants.[1] In a pending separate proceeding, we are looking toward a rule that the handicapped are entitled to have their problems, needs, and interests ascertained where they constitue a significant element of the licensee's community.[2] We are establishing a clearinghouse program and coordinator to encourage and assist licensees in increasing employment of and service to the handicapped. And, as detailed in paragraph 28 of this decision, the Commission is engaged in efforts to stimulate and foster industry technological innovations responsive to the unique and special needs of the handicapped.[3] In accordance with our mandate to encourage the larger and more effective use of radio and television in the public interest, I expect that the Commission will continue to explore additional ways and means of expanding broadcasting's service and responsiveness to the handicapped.

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[1]See *Petition for Rulemaking To Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766, 768-69 (1968).

[2]*Amendment of the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees*, Notice of Proposed Rulemaking, 43 Fed Reg. 35357 (August 9, 1978). Further Notice of Proposed Rulemaking, 43 Fed Reg. 41241 (September 15, 1978).

[3]See also *Use of 21 for Television Program Captioning for the Deaf*, 63 FCC 2d 378 (1976). Separate Statement of Commissioner Joseph R. Fogarty, *Id.* at 392.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	Docket No. 21474
Amendment of Broadcast Equal	)	RM-1968 RM-2978
Employment Opportunity Rules	)	RM-2810
and FCC Form 395.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1980; Released: August 4, 1980

By the Commission: Commissioner Lee concurring in part and dissenting in part.

1. Presently before the Commission is a petition for reconsideration of the *Second Report and Order* in this proceeding, 76 F.C.C. 2d 86 (1980), filed by the California Paralyzed Veterans Association, Paula Zeller, and Patty Ann Berkosky ("petitioners").[1]

2. In the *Second Report and Order*, the Commission considered the matter of the inclusion of the handicapped in our equal employment opportunity ("EEO") rules,[2] as addressed in our *Further Notice of Proposed Rule Making*, FCC 78-468, released July 7, 1978, 43 Fed.

[1]Petitioners are plaintiffs in *California Paralyzed Veterans Association* v. *FCC*, Civil No. CV 79-0501-WPG (C.D. Cal.), and petitioner Berkosky is also the plaintiff in *Berkosky* v. *Department of Labor*, Civil No. 79-1633-WPG (C.D. Cal.). In both cases, petitioners seek action similar to that requested in the petition now before us. Petitioners' claims against the Commission have recently been dismissed on jurisdictional grounds.

[2]The Commission's EEO Rules, Section 73.2080, require both nondiscrimination and affirmative action.

Reg. 30078, published July 13, 1978. Also before us was the request that we consider action to increase broadcast ownership and management by physically handicapped persons.

3. We determined, as we had on earlier occasions,[3] that the issuance of a broadcast license by the Commission does not constitute a grant of Federal financial assistance, which would subject a licensee to the nondiscrimination requirements of Section 504 of the Rehabilitation Act of 1973, as amended ("the Rehabilitation Act"), 29 U.S.C. §701 *et seq.*, and that the Commission is not one of the agencies charged by Executive Order 11914 with Section 504 implementation.[4] 76 F.C.C. 2d, at 96-98.

4. The Commission also found that there were problems unique to implementing an EEO program for handicapped persons, as compared to the areas of sex and race/ethnicity to which our present EEO program is directed. For example, data collection of the type we presently utilize on Form 395 would not be viable as to the handicapped because of problems of definition, identification and privacy. The data base by which we compare an employer's workforce to the area labor force does not exist in the same form for handicapped persons as it does for race and sex.

5. We noted that the Commission's present EEO program is geared largely to systemic discrimination, but that it did not appear that the Commission's systemic

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[3] *In the License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California*, 69 F.C.C. 2d 451 (1978), *reconsid. denied*, 72 F.C.C. 2d 273 (1979).

[4] Section 504 states in part that no otherwise qualified handicapped individual shall, solely by reason of his or her handicap, ". . .be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

approach would be effective as to handicapped individuals. We further observed that we were extremely reluctant to take action to require modification of licensees' facilities to accommodate handicapped individuals in the absence of a specific statutory mandate. Having considered all the factors involved, we determined not to undertake a formal EEO program for handicapped individuals. For the same reasons, we determined not to adopt a program to enhance ownership and management by the physically handicapped. We also noted that obstacles to ownership and management such as would show the need for such a program had not been identified in this proceeding. 76 F.C.C. 2d, at 93-96, 98-99.

6. Although we declined to adopt an EEO program for handicapped individuals, we stated our intention to consider a finding of illegal discrimination on the basis of handicap made by any Federal, State or other governmental agency or court with appropriate jurisdiction, as bearing on the character of an applicant for a broadcast license. We also noted that the Commission has jurisdiction under the public interest standard to consider alleged violations of law even before findings are made by another agency, and that circumstances might arise where such action would be appropriate. 76 F.C.C. 2d, at 96, 99.

7. Additionally, we determined that it would be appropriate for the Commission to designate a coordinator for broadcasting and the handicapped, to be located in the Office of Public Affairs. This individual will operate a clearinghouse program to provide information to licensees regarding such issues as methods of facilities and equipment modification, equipment availability, and other means by which to increase employment of and service to handicapped individuals. 76 F.C.C. 2d, at 99.

8. In the pleading before us, petitioners undertake to reargue the matters of the nature of the national policy regarding the employment of handicapped individuals, whether Section 504 of the Rehabilitation Act applies to Commission licensees, whether distinctions can be made between the handicapped and groups currently included in the Commission's EEO rules, and whether a program designed to enhance broadcast station ownership and management by handicapped individuals should be instituted. It is well-settled that:

> ". . .reconsideration will not be granted merely for the purpose of again debating matters on which we have already deliberated and spoken." *WWIZ, Inc.*, 37 F.C.C. 685 (1964), *aff'd. sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 842 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1965).

We have fully considered these issues in our *Second Report and Order*, and no useful purpose would be served by further discussion here. As to these matters, petitioners have set forth no new facts or arguments which would cast any doubt on the correctness of the decisions announced in the *Second Report and Order.*

9. Petitioners also contend that the Commission's failure to include handicapped individuals in an EEO program denies such individuals of "the equal protection of the law guaranteed by the Fifth Amendment and the freedom of speech and press guaranteed by the First Amendment." Petitioners assert that the Commission, by its actions and inaction, "has given the broadcast licensees a green light to discriminate against handicapped individuals."

10. Petitioners' conclusions are erroneous. As we have indicated in para. 6, *supra*, the Commission will consider findings of illegal discrimination on the basis of handicap

as bearing on the character of its licensees, and has also taken affirmative steps to increase the employment of handicapped individuals in broadcasting through its establishment of a coordinator for that purpose. The mere fact that one group is treated differently from another does not mean that the distinction is constitutionally impermissible under the equal protection component of the Due Process Clause of the Fifth Amendment. See, for example, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).[5] In the *Second Report and Order*, the Commission has set forth a reasoned basis for its determinations, and in this situation the Constitution commands no more. Further, it is clear that the failure of government to take action cannot, for purposes of constitutional analysis, be interpreted as in effect constituting "authorization" or "encouragement" of the disputed conduct in question. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164-165 (1978).

11. Petitioners argue that the Commission has violated the First Amendment rights of handicapped individuals because the tastes and views of such individuals are ignored when they are systematically excluded from broadcast employment. This conclusion is premised on the view that the Commission is "sanctioning and affirmatively fostering and encouraging discrimination in employment on the basis of handicap." The premise, as we have demonstrated, is invalid. Additionally, the mere licensing of a broadcaster by the Commission does not convert the broadcaster's action into governmental action for constitutional purposes. See, in this regard, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 171-177 (1972), *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350-352 (1974).

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[5] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valco*, 424 U.S. 1, 93 (1976).

See, also, *Kuzco* v. *Western Connecticut Broadcasting Co.*, 566 F.2d 384, 387 (2nd Cir., 1977), and cases cited therein. The Commission's determination not to take a particular action cannot, as we have shown, be converted into a determination that the Commission has therefore encouraged certain behavior. *Flagg Bros., supra.*

12. Accordingly, IT IS ORDERED, That the petition for reconsideration of the Commission's *Second Report and Order* in Docket 21474, filed by the California Paralyzed Veterans Association, Paula Zeller, and Patty Ann Berkosky, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

O'MELVENY & MYERS
611 West Sixth Street
Los Angeles, California 90017
(213) 620-1120

WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Filed 3/11/80
Entered 3/14/80

OF COUNSEL:
RALPH E. GOLDBERG
ELEANOR S. APPLEWHAITE
51 West 52nd Street
New York, New York 10019
(212) 975-3711

Attorneys for Defendant
CBS Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE CALIFORNIA PARALYZED VETERANS ASSOCIATION, etc., et al., Plaintiffs, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Defendants.	NOS. CV 79 0504 WPG CV 79 0644 WPG CV 79 1633 WPG ORDER OF DISMISSAL AND STAY

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., a California Corporation,

Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION: COLUMBIA BROADCASTING SYSTEM, INC., a corporation; et al.,

Defendants.

PATTY ANN BERKOSKY, individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

DEPARTMENT OF LABOR; FEDERAL COMMUNICATIONS COMMISSION; AMERICAN BROADCASTING COMPANY, et al.,

Defendants.

These matters came on regularly for hearing on February 19, 1980, before the Honorable William P. Gray, United States District Judge, presiding. Defendants National Broadcasting Company, Inc. ("NBC"), CBS Inc. ("CBS"), American Broadcasting Company ("ABC"), and the Federal Communications Commission and its individual commissioners (the "FCC"); have respectively moved for orders dismissing the above captioned actions for failure to state a claim upon which relief can be granted and, in part, for lack of jurisdiction.

The Court has considered the pleadings, the parties' memoranda of points and authorities, all other filings, and the oral argument on the motions. The Court finds that as a matter of law the moving defendants are entitled to the order that is set forth below. Thus,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All claims against the FCC are dismissed for lack of jurisdiction; in light of the Commission action of 2/13/80.

2. All proceedings against NBC, CBS, and ABC under Section 504 of the Rehabilitation Act are stayed pending further order of this Court;

3. The motions for dismissal of all claims against NBC, CBS, and ABC under Section 503 of the Rehabilitation Act are taken under submission by this Court;

4. All other claims against NBC, CBS, and ABC are dismissed for failure to state a claim upon which relief can be granted, including:

A. All claims under the United States Constitution, because the alleged conduct is not government action.

B. All claims under the common law, because these defendants are not public utilities.

LAW OFFICES
STANLEY FLEISHMAN
A PROFESSIONAL CORPORATION
433 NORTH CAMDEN DRIVE, SUITE 900
BEVERLY HILLS, CALIFORNIA 90210
(213) 550-7460

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., a California corporation, Plaintiff, vs. FEDERAL COMMUNICATIONS COMMISSION, etc., et al., Defendants.	No. CV 79-0644 WPG CV 79-0501 WPG CV 79-1633 WPG
CALIFORNIA PARALYZED VETERANS ASSOCIATION, etc., et al., Plaintiffs, vs. FEDERAL COMMUNICATIONS COMMISSION, etc., et al., Defendants.	O R D E R
PATTY ANN BERKOSKY, etc., et al., Plaintiffs, vs. DEPARTMENT OF LABOR, et al., Defendants.	

These matters came on regularly for hearing on October 6, 1980 before the Honorable William P. Gray, United States District Judge, presiding. Plaintiffs have filed motions, inter alia, to amend this Court's Memorandum of Decision dated August 1, 1980, so as to certify interlocutory appeals under 28 U.S.C. § 1292(b). The Court, being fully advised, denied said motions and indicated that it would grant a motion made pursuant to Rule 54(b) of the Rules of Civil Procedure, enabling plaintiffs to appeal from the Court's ruling dismissing all claims against defendant Federal Communications Commission.

It appearing that plaintiff seeks, at this time, to only appeal from the Court's ruling dismissing all claims against the Federal Communications Commission in the case of *California Association of the Physically Handicapped, Inc., a California corporation, Plaintiff, v. Federal Communications Commission, Columbia Broadcasting System, Inc., a corporation, et al, Defendants*, No. CV 79-0644 WPG.

IT IS ORDERED that a final judgment be entered in favor of the defendant Federal Communications Commission in case No. 79-0644 WPG only.

DATED: November 10, 1980

WILLIAM P. GRAY

WILLIAM P. GRAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., et al.,

Appellant-Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, et al.,

Appellees-Respondents.

CBS, INC., et al.,

Intervenors.

NOS. 80-6088
80-7157
80-7482

FCC No. 21474
DC# CV 79-0644
WPG

O R D E R

Before: WRIGHT and SCHROEDER, Circuit Judges, and EAST, Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Schroeder has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

1. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, provides:

> *§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations*
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

2. The Communications Act of 1934 as amended, provides in relevant part:

> *47 U.S.C. § 151. Purposes of chapter; Federal Communications Commission created*
>
> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the

purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. §307 provides in part:

§307. Licenses; allocation of facilities; terms; renewals

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same. . . .

47 U.S.C. §309 provides in part:

§309. Application for license — Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this

> title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> . . . .

3. *Constitutional Provision*

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of . . . liberty . . . without due process of law. . . .

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 15, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing three (3) true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

Robert R. Bruce, Esq.
General Counsel
Federal Communications Comm'n
1919 M Street, N.W.
Washington, D.C. 20554

J. Roger Wollenberg
Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Thomas J. Daugherty, Esq.
Metromedia, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)

No. 83-2069

In the Supreme Court of the United States

OCTOBER TERM, 1984

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel
Federal Communications Commission
Washington, D.C. 20554

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2069

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners challenge the decision of the court of appeals, declining to order the Federal Communications Commission to promulgate regulations applicable to broadcasters to include the handicapped as a group protected by the Commission's equal employment opportunity rules. Petitioners argue that the FCC's refusal to adopt such rules violated the "public interest" requirement of the Communications Act of 1934, 47 U.S.C. 307(a); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and the equal protection component of the Due Process Clause of the Fifth Amendment.

1. In September 1977, petitioner California Association of the Physically Handicapped (CAPH) filed a petition with the FCC requesting the Commission to promulgate regulations (1) to expand its equal employment opportunity

(EEO) rules to include handicapped individuals; (2) to give some preference to handicapped individuals in the ownership and management of broadcast facilities; and (3) to require the FCC's licensees to make their facilities accessible to handicapped individuals (Pet. App. 2). In response, the FCC requested public comments on the proposal (Pet. App. 13), and in light of those comments, the Commission issued a report and order declining to promulgate the proposed regulations (Pet. App. 11-41).

In rejecting the proposal, the Commission first considered whether it was required by federal law to adopt regulations concerning the handicapped. The Commission held that neither the "public interest" standard in the Communications Act nor Section 504 of the Rehabilitation Act, which prohibits discrimination against the handicapped in any program or activity that receives federal financial assistance, required the FCC to adopt rules to protect the handicapped (Pet. App. 22-30). Next, the Commission considered whether it should exercise its discretion under the public interest standard and include the handicapped within the coverage of its existing EEO regulations for women and minorities (*id.* at 30-32). The Commission concluded that it would be unwise to adopt a general rule on the subject because of the unique difficulties in defining and identifying the handicapped, as compared to other disadvantaged groups, and the practical problem of determining what accommodations should be made for them, which the FCC concluded could only be effectively accomplished on a case-by-case basis (Pet. App. 30-31).

Although the Commission rejected petitioner CAPH's specific proposal, the FCC noted that various commenters on the proposal suggested that it would be helpful if the Commission would attempt to provide licensees with more information concerning handicapped persons. Accordingly, the Commission appointed a coordinator for "broadcasting

and the handicapped" (Pet. App. 33). The coordinator was authorized to serve as an information clearinghouse for licensees with respect to the employment of the handicapped in broadcasting and on the methods by which licensees' facilities could be made to accommodate reasonably the handicapped (*ibid.*).[1]

2. The court of appeals affirmed (Pet. App. 1-9). Relying upon this Court's decision in *Community Television of Southern California* v. *Gottfried*, 459 U.S. 498 (1983) the court of appeals held that Section 504 of the Rehabilitation Act "does not require the FCC to issue the regulations [petitioners] request[]" (Pet. App. 4). The court also relied upon *Gottfried* in holding that the "public interest" standard in the Communications Act provides no basis for requiring the FCC to adopt rules concerning the handicapped (Pet. App. 4-5). Finally, the court held that the disparate treatment the FCC has accorded the handicapped

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[1]Petitioners California Paralyzed Veterans Association (CPVA), Paula Zeller and Patty Ann Berkosky filed a petition for reconsideration of the FCC report and order. In addition to the statutory arguments that CAPH had presented, these petitioners also claimed that the Commission's action denied the handicapped equal protection guaranteed them by the Fifth Amendment. The FCC denied the petition on August 4, 1980; it explained that its justification for not treating the handicapped the same as minorities and women was reasonable, and therefore, the different treatment did not violate the Fifth Amendment (Pet. App. 46-47). The Commission's denial of the petition for reconsideration was appealed to the court of appeals and consolidated with CAPH's petition for review of the initial FCC order.

CAPH also filed suit in February 1979 in the United States District Court for the Central District of California against the FCC and various broadcast licensees. The district court dismissed the suit for lack of subject-matter jurisdiction after the Commission entered its order rejecting CAPH's petition (Pet. App. 49-51). CAPH appealed this decision to the court of appeals and the case was then consolidated with the two petitions seeking review of the FCC's initial order and order on reconsideration.

compared to women and minorities does not violate the handicapped's equal protection rights. The court reasoned that the classification should be judged under a rational relationship test, and that the Commission reasonably concluded that it would require a greater expenditure of agency resources to monitor rules concerning the handicapped than to monitor the rules concerning minorities and women (Pet. App. 5).[2]

3. Petitioners (Pet. 7-17) contend that the national policy favoring the elimination of invidious discrimination against the handicapped, expressed in Section 504 of the Rehabilitation Act, requires the FCC to promulgate regulations governing broadcast licensees' treatment of the handicapped. This Court in *Community Television of Southern California* v. *Gottfried, supra,* however, settled this issue, by holding that this statute does not impose any such enforcement obligation. With respect to Section 504 of the Rehabilitation Act, this Court declared that the Commission "is not a funding agency and has never been thought to have responsibility for enforcing § 504." 459 U.S. at 509. Since Congress did not expressly impose any new enforcement obligation on the Commission by adopting the Rehabilitation Act, it follows, *a fortiori,* that Congress did not impose such an obligation implicitly by incorporating Section 504's standards into the Communications Act through the "public interest" standard (see Pet. App. 4-5). Nor did the Commission abuse its wide discretion under the "public interest" standard by declining to adopt EEO regulations for the handicapped. See *Community Television of Southern California* v. *Gottfried,* 459 U.S. at 512. It fully

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[2]The court of appeals also affirmed the district court's dismissal of CAPH's lawsuit and rejected petitioners' claim for attorneys' fees (Pet. App. 7-9). Petitioners do not present any question concerning these two issues in their petition.

explained that its decision was based on the difficulty the Commission would have in enforcing any rule designed to protect the handicapped as a class.[3]

4. Petitioners also assert that the Commission's failure to expand its EEO program to include handicapped persons violated their equal protection rights (Pet. 17-23). In support of this argument, petitioners claim (*id.* at 17-19) that the handicapped should be considered a suspect class and therefore the FCC's decision should be subjected to a standard of judicial review more intrusive than the rational relationship test used by the court of appeals. But as the court below pointed out, no court of appeals has ever held handicapped persons to be a suspect class (Pet. App. 5). See *Brown* v. *Sibley*, 650 F.2d 760, 766 (5th Cir. 1981).[4] It is, in

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[3]Petitioners assert (Pet. 23-26) in this Court for the first time that Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793, requires the FCC to promulgate regulations for the handicapped because FCC licenses can be viewed as federal contracts and hence the licensees are subject to that Section's affirmative action provision. This issue is not properly presented for decision by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, it is clear that federal broadcast licenses are not contracts, but merely temporary grants of privilege by the FCC. There is no exchange of goods or property within the meaning of the regulations governing federal contracts. 41 C.F.R. 60-741.2 (definition of government contract); see *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[4]Petitioners suggest (Pet. 18-19) that, in the alternative, handicapped individuals constitute a semi-suspect class and their treatment should be subject to a standard of review greater than that used to judge economic regulations, but less exacting than that used to judge classifications based on race (Pet. 18-19). It is clear, however, that the handicapped as a class do not meet the criteria for any heightened scrutiny under the Constitution. Since the handicapped class is composed of many subgroups, some of which have vastly different disabilities, it is, as a group, not subject to a single set of stereotyped characteristics; nor is there evidence that these individuals, again as a group, are the target of deep-seated prejudice of the kind to which other minorities are exposed. Cf. *Cleburne Living Center, Inc.* v. *City of Cleburne*, 726 F.2d 191,

any event, far from self-evident that suspect-classification analysis could somehow undermine a governmental determination *not* to differentiate between the handicapped and non-handicapped. The Commission's rules concerning minorities, for example, are valid *despite*, rather than because of, the fact that race is a suspect classification.

Accordingly, the court of appeals properly applied the rational basis test and correctly held that the FCC's explanation for its order satisfied that standard (Pet. App. 5). The reasons cited by the agency — the unique and multifaceted problems of handicapped persons and the limited resources and expertise of the Commission to set up an EEO program beyond one aimed at systemic discrimination — justified its refusal to expand the EEO rules to include the handicapped.

195-200 (5th Cir. 1984) (intermediate scrutiny warranted where class consists of one special disability — mentally retarded). In the absence of these factors, the rational relationship test was the appropriate standard for reviewing the FCC's decision. See *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982); *J.W.* v. *City of Tacoma*, 720 F.2d 1126, 1128-1129 (9th Cir. 1983).

If petitioners were correct that the FCC's refusal to accord the handicapped precisely the same protections as minorities and women is impermissible, then Congress's decision *not* to make Section 504's coverage coterminous with Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, which more comprehensively prohibits discrimination by employers against various groups, would seem to be equally suspect. The Commission relied heavily upon the difference in the statutes to justify refusing to include the handicapped within the protections of its EEO rule (Pet. App. 25).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel
Federal Communications Commission

AUGUST 1984

DOJ-1984-08